91-1345

No. _____

In The

Supreme Court of the United States

October Term, 1991

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO; THE COALITION FOR ECONOMIC EQUITY; SAN FRANCISCO HISPANIC CHAMBER OF COMMERCE; ASIAN, INC.; and SAN FRANCISCO BLACK CHAMBER OF COMMERCE,

Respondents.

Petition for Writ of Certiorari to the United States Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit abused its discretion in refusing to follow its earlier ruling that under California law the San Francisco City Charter (City Charter) prohibits race, gender, or local business preference in the award of public construction contracts.

2. Whether the Ninth Circuit's ruling that the Federal Civil Rights Act provisions, 42 U.S.C. §§ 1981 and 1983, and the Equal Protection Clause of the Fourteenth Amendment do not prohibit San Francisco from awarding a 10% bid preference on city contracts, based on the race of the bidder conflicts with this Court's ruling in *City of Richmond v. J. A. Croson Company*.

PARTIES TO THE PROCEEDING

The parties listed in the caption, and no others, were parties to this action in the Ninth Circuit Court of Appeals. Petitioner, Associated General Contractors of California, Inc., is an affiliate of Associated General Contractors of America.

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OPINIONS BELOW

The decision of the Ninth Circuit is not yet reported and is reproduced as Appendix (App.) A. The decision of the District Court is reported at 748 F. Supp. 1443 (N.D. Cal. 1990) and is reproduced at Appendix B. Page references are to the version in the appendix.

JURISDICTION

Petitioner brought this action in United States District Court for the Northern District of California pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). The decision of the United States Ninth Circuit Court of Appeals, review of which is sought in this petition, was entered on December 6, 1991, and was filed that same day. No petition for rehearing was sought. The petition for writ of certiorari has been timely filed in accordance with Rule 13 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1981 Equal Right to Contract:

> "All persons within the jurisdiction of the United States shall have the same right in every

> State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, taxes, licenses and exactions of every kind, and to no other."

42 U.S.C. § 1983 Deprivation of Rights Under Color of Ordinance:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

In earlier litigation between petitioner, Associated General Contractors of California, Inc. (AGCC), and respondent City and County of San Francisco (City), the Ninth Circuit ruled that City's Charter § 7.200 prohibits all race and gender, and most local business, preferences for City public works contracts exceeding $50,000. *Associated General Contractors of California, Inc. v. City and County of San Francisco* (*AGCC I*), 813 F.2d 922, 927 (9th Cir. 1987). That court further found, *inter alia*, that with respect to contracts of $50,000 or less (*i.e.*, those not

covered by the City Charter competitive bidding requirements), provisions of the 1984 City ordinance that provided preferences to Minority Business Enterprises (MBEs) were void as in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 944. The court found the provisions giving preferences to Women Business Enterprises (WBEs) facially valid, but subject to as-applied challenges, and that the preferences for Local Business Enterprises (LBEs) were valid. *Id.* After further hearings, City's Board of Supervisors (Board) passed the Minority/Women/Local Business Utilization Ordinance, No. 175-89 (MBE/WBE/LBE Ordinance--II or Ordinance), which took effect July 1, 1989. App. A 7. That Ordinance is reproduced as Appendix C.

The Ordinance extends a preference, except where prohibited by state or federal law or regulation, in all City bids and contracts as follows:

> "(1) [A] five percent (5%) preference to (i) a local business or (ii) a joint venture with local MBE or local WBE participation which equals or exceeds thirty-five percent (35%) but is under fifty-one percent (51%); (2) a ten percent (10%) preference to (i) a local MBE or local WBE or (ii) a joint venture with local MBE or local WBE participation which equals or exceeds fifty-one percent (51%)." Ordinance § 12D.8(B)2, App. C 22.

MBE is defined, in pertinent part, as "an economically disadvantaged local business which . . . is owned and controlled by one or more minority persons." Ordinance § 12D.5. Minority is defined as "members of one of the following ethnic groups: Asians (defined as Chinese,

Japanese, Koreans, Pacific Islanders, Samoans, Filipinos, and Southeast Asians), Blacks and Latinos (defined as Mexicans, Puerto Ricans, Cubans, Central or South Americans)." *Id.* WBE is defined in pertinent part, as "an economically disadvantaged local business which . . . is owned and controlled by one or more women." *Id.*, App. C 14-17.

Economically disadvantaged business is pertinently defined as "a business whose average gross annual receipts in the three fiscal years immediately preceding its application for certification as a MBE or WBE does not exceed the following limits: (1) Public Works/Construction—$14 million." *Id.*

On November 20, 1989, City enacted Ordinance No. 424-89 which purported to raise the competitive bidding threshold of City Charter § 7.200 from $50,000 to $10 million. App. A 8-9. On December 18, 1989, AGCC filed its complaint in this action, together with a motion for temporary restraining order and preliminary injunction. The District Court denied the motion for temporary restraining order on December 26, 1989, and the motion for preliminary injunction on October 9, 1990. The Ninth Circuit affirmed the decision of the District Court on December 6, 1991.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(a) lists among the considerations governing review on certiorari the circumstance when a United States Court of Appeals has so far departed from the accepted and usual course of judicial

proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. Rule 10.1(c) includes as a ground for review when a United States Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court. Both of these grounds for review are present in this case.

I

THE DECISION BELOW CONFLICTS WITH THIS COURT'S RULINGS THAT RACE-BASED PREFERENCES MUST BE SUBJECTED TO STRICT SCRUTINY

As a preliminary matter, petitioner wishes to explain the reason it files this petition in this Court rather than seek further relief in the lower courts after denial of its motion for preliminary injunction in the District Court and affirmance of that denial by the Ninth Circuit. The key issues of this case are whether San Francisco established the necessary factual predicate for its race-based preference and then narrowly tailored its remedy to that factual predicate. Thus the factual predicate either had or had not been established at the time of the adoption of the Ordinance. Therefore, the legislative record which was before the lower court in these proceedings, and relied on by the parties, was complete. There is nothing further which could be adduced at trial as to whether the necessary facts of prior discrimination had been found by the City and whether the remedy the City elected was narrowly tailored to those facts.

Further, a petition for rehearing in the Ninth Circuit would not be likely to provide adequate or timely relief to petitioner under the circumstances of this case. In *AGCC I*, petitioner received a favorable decision on March 23, 1987. City filed a petition for rehearing on April 6, 1987. That petition was not decided and dismissed until September 27, 1989, by which time the Ordinance there in issue had expired and the present Ordinance adopted. Thus petitioner, although prevailing, was unable to obtain any relief for its members from an ordinance ruled to be in violation of their civil rights. The present Ordinance will expire on June 30, 1992, and be replaced by a new but similar ordinance at three year intervals. Ordinance § 12D.15(E). App. C 40. Thus unless this Court grants relief, petitioner will be faced with a series of short-term ordinances which, under the standards set by the Ninth Circuit, are not subject to preliminary injunction. The Ninth Circuit decision thus effectively authorizes a series of race-based preferences, capable of repetition yet evading review, *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911), and precludes petitioner's members from obtaining any relief from race-based discrimination in violation of their equal protection rights.

In considering AGCC's motion for preliminary injunction, the courts below had before them the guidelines established in previous litigation between AGCC and City, *AGCC I*. The Ninth Circuit there set forth the legal principles governing both the interpretation of City's Charter and the Equal Protection of the Laws Clause of the Fourteenth Amendment. The legal principles which apply to this case were decided in *AGCC I* and *City of Richmond v. J. A. Croson Company*, 488 U.S. 469.

(1989). The Ninth Circuit ruled that racial and ethnic preferences should be subjected to strict scrutiny. *AGCC I*, 813 F.2d at 928. Similarly, *Croson* held that race-based programs, including affirmative action programs, are suspect classifications subject to strict scrutiny by the courts. Plurality opinion of Justice O'Connor, joined by Justices White, Kennedy, and the Chief Justice. 488 U.S. at 493-95 and Justice Scalia concurring at 520.

Rather than subjecting City's race-based bid preference to the strict scrutiny required of a suspect classification, the courts below apparently applied a standard of upholding the preferences if any evidence could be found to support them. The courts uncritically accepted all evidence put forth by the City to support the Ordinance and either ignored or minimized evidence submitted by AGCC in opposition. Thus the lower courts appeared to apply a tacit standard of affirming the Ordinance if any substantial evidence was present in the record to support it. Because the courts below ignored the principles of strict scrutiny, the rulings denying AGCC's motion for preliminary injunction have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II

THE AGCC I AND CROSON DECISIONS INDICATE PETITIONER'S PROBABLE SUCCESS ON THE MERITS

A. The Ninth Circuit Has Refused to Apply Clear California Law on the City Charter Issue

The Ninth Circuit noted that a party seeking preliminary injunctive relief must demonstrate either a

combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. App. A 21.

The Ninth Circuit held in *AGCC I* that under California law, San Francisco City Charter § 7.200, which requires any public works contract exceeding $50,000 to be let to the lowest reliable and responsible bidder, prohibits all race and gender and most local business preferences for City public works contracts exceeding $50,000. *AGCC I*, 813 F.2d at 927. City sought to end run this ruling by its enactment on November 20, 1989, of Ordinance No. 424-89. Ordinance No. 424-89 purports to raise the $50,000 competitive bidding threshold specified in City Charter § 7.200 to $10 million. App. A 8-9.

The Ninth Circuit had earlier noted:

> "Competitive bid statutes are designed to protect against a variety of ills that might befall the government procurement process: sloth, lack of imagination or carelessness on the part of those who award public contracts; inadequate notice to potential bidders, causing contracting officers to act on the basis of ignorance or misinformation; and, perhaps most important of all, insufficient competition to assure that the government gets the most work for the least money." *AGCC I*, 813 F.2d at 926.

But in the instant case, the court did not require City to provide a race-neutral explanation for its evisceration of these protections. Indeed, the Ninth Circuit observed that "it appears reasonable to assume that the Board passed

[the $10 million competitive bid ceiling] in order to facilitate its MBE preference scheme." App. A 25-26 n.6.

The last paragraph of City Charter § 7.200 was amended in 1986 to read: "Beginning with fiscal year 1987-88, the board of supervisors shall be authorized to increase or decrease by ordinance the dollar amount set forth in any provision of this section." App. A 22. The Ninth Circuit noted that California Constitution Article XI, Section 3, provides that a county or city may adopt a charter by majority vote of its electors voting on the question and amend the charter in the same manner (citing *Uhl v. Collins*, 217 Cal. 1, 3 (1932), *Alexander v. Mitchell*, 119 Cal. App. 2d 816, 822 (1953)). App. A 24.

The court further cited, App. A 24, *Montgomery v. Board of Administration*, 34 Cal. App. 2d 514 (1939), in which the California Supreme Court held that San Diego's City Council had no power to pass ordinances that conflicted with the city's charter, despite provisions in the charter that allowed the council to establish such rules and regulations as it may deem proper. Charter Section 146 further specified that any ordinances so enacted would have equal force and effect with said article and would be construed to be a part of it. In invalidating this provision the court held that an amendment to a charter must be submitted to and approved by a majority of the electors, that there is no other way in which a city charter may be amended, and any attempt to do so in any other manner is void. *Id.* at 520. The court then declared:

> "If section 146 of the charter must be construed as giving authority to the city council of San Diego *by ordinance to add to or subtract from*

> *the charter provisions* or make regulations for the administration of the retirement system inconsistent with the clear provisions of that document, it must be held to be unconstitutional as attempting to permit the amendment of the charter in an unauthorized manner." *Id.* at 520 (emphasis added).

Although the Ninth Circuit recognized this "clear dictate of California law," App. A 25, it declined to follow it. The court found that "[w]hile California law emphatically prohibits the Board from amending the charter, it does not provide guidance to aid in our determination whether the bidding threshold ordinance challenged here should be deemed such an unlawful amendment." *Id.* The court found little difference in a procedure whereby the charter authorized the Board to set a bid threshold within a specified range and the fact situation at bar in which the Board was authorized to *increase or decrease by ordinance* the amounts set forth in the charter. App. A 25.

The court concluded that AGCC failed to demonstrate that it was likely to succeed on the merits of the charter issue; at most, it raised serious questions and thus in order to merit a preliminary injunction must demonstrate that the balance of hardships tips sharply in its favor. In considering the hardships that would be caused to women and minorities in issuing the injunction in combination with the City's interest in remedying discriminatory practices, the court concluded that AGCC failed to show that the balance of hardships tips sharply in its favor. App. A 23-24.

In so ruling the court ignored AGCC's argument that pursuit of a lawful profession is a fundamental right.

Truax v. Raich, 239 U.S. 33, 41 (1915); *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17 (1971). The balance of hardship tilts sharply in favor of plaintiffs who are being deprived by the challenged Ordinance of the opportunity to pursue a fundamental right. *See Ebel v. City of Corona*, 698 F.2d 390, 393 (9th Cir. 1983). Given the race-based context in which the question arises, the lower court's failure either to apply strict scrutiny to the issue or to follow state law as state courts construe it, calls for the supervision of this Court.

B. The MBE Bid Preference Violates AGCC Members' Civil and Constitutional Rights

The Ninth Circuit also rejected AGCC's claims under the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. §§ 1981 and 1983. Although the court acknowledged that an alleged constitutional infringement will often alone constitute irreparable harm (citing *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984)), it found that whether or not AGCC would be entitled to such a presumption, it had not demonstrated a sufficient likelihood of success on the merits of its constitutional claims to warrant the issuance of a preliminary injunction. App. A 27-28.

Section 1981 guarantees the right in every state and territory to make and enforce contracts and prohibits discrimination against nonminorities as well as minorities. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 295 (1976). Section 1983 forbids the deprivation of

any rights, privileges, or immunities secured by the Constitution and laws under color of state law. Section 1 of the Fourteenth Amendment declares in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." City ordinances are considered state action for the purposes of this amendment. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

The Ninth Circuit acknowledged that *Croson*, 488 U.S. at 493, directed that strict scrutiny be applied to all race-conscious programs. App. A 28. The Court further correctly stated the standard that to survive strict scrutiny a municipality's classifications based on race must serve a compelling state interest and must be narrowly tailored to further that interest. App. A 28-29 (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986)). But having stated the test, the Ninth Circuit proceeded to permit its flagrant violation by the San Francisco race-based preferences.

In *City of Richmond v. Croson*, a majority of this Court held that race-based programs, including affirmative action programs, are suspect classifications subject to strict scrutiny by the courts. Plurality opinion of Justice O'Connor, joined by Justices White, Kennedy, and the Chief Justice. 488 U.S. at 493-95 (Scalia, J., concurring at 520). The majority opinion itself requires that a race-conscious plan contain a factual predicate that identifies past discrimination sufficient to establish a compelling governmental interest in apportioning public contracting opportunities based on race. *Id.* at 504. As the Court observed, "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise

scope of the injury it seeks to remedy." *Id.* at 498. Yet it is precisely the kind of "generalized assertions" found insufficient by *Croson* that City relied on in its findings to rationalize its 1989 Ordinance.

The Ninth Circuit found that City departments continued to discriminate against MBEs and WBEs and continued to operate under an "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. App. A 32. (The court ignored AGCC's argument that this was not possible under the City Charter provision requiring award of contracts to the lowest responsible and reliable bidder.) The City's findings noted statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. App. A 32-33.

The Ninth Circuit found that the City's findings appear supported by the record, citing a study prepared by BPA Economics, Inc. *Id.* That study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs. *Id.*

However, this method is statistically invalid because it calculates the percentage of available MBEs by their ratio to San Francisco businesses, but ignores the fact that the City contracts with firms outside its borders. Thus if MBEs constitute 49.5% of prime construction contractors in San Francisco, they would be expected to attain that share of City contracts (all things being otherwise equal as to licensing, bonding capacity, and other qualifications), only if the City restricted its contracting to San Francisco businesses. But because the City frequently

contracts with firms from outside its limits, the statistical base is seriously skewed. The Ninth Circuit passed over this error, holding that since the ordinance at issue applied only to resident MBEs, the City appropriately confined its study to the City limits in order to focus on those whom the preference scheme targeted. App. A 36.

The court similarly dismissed AGCC's challenge to the manipulation of statistics by City to achieve a lower MBE participation rate. The court noted that the statistics presented in the City Budget Analyst March 17, 1989, Report show that MBEs received 36.7% of prime contract dollars awarded for fiscal year 1987-88. App. A 34-35. The court acknowledged that this data was also used to calculate the BPA statistics. *Id.* Yet, the BPA study adopted by City showed a much lower MBE participation rate of 11.1% for prime construction contracts. App. A 33.

City explained that this disparity in results of use of the same data came from "refinements" made in the data in order to tailor it more closely to the ordinance's scope. App. A 35. Among those "refinements" was the exclusion of all public works construction contracts of less than $250,000. *Id.* Smaller and newer businesses, as MBEs tend to be, would presumably receive a large share of these smaller contracts. However, the courts below did not subject these "refinements" by BPA to the required strict scrutiny and gave City the benefit of the doubt in its reduction of City's own MBE participation figures to less than one third of the original amount without requiring an adequate explanation of this statistical sleight of hand. *Id.*

C. San Francisco's Race Preferences Are Not Narrowly Tailored to Remedy the Types of Discrimination Identified

The Ninth Circuit found that in order to survive strict scrutiny, a race-conscious remedy must not only serve a compelling state interest, it must be narrowly tailored to redress the consequences of discrimination. App. A 38. The court then identified three characteristics identified by *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race neutral means of increasing minority business participation in public contracting. Second, the plan should avoid the use of rigid numerical quotas, including allowance of waivers in appropriate cases. Third, an MBE program must be limited to the boundaries of the enacting jurisdiction. Having stated these tenets, the court then proceeded to permit the San Francisco plan to violate the first two of them.

1. The Ordinance Rejects Race-Neutral or Less Drastic Means

Croson found that the city had apparently not given any consideration to the use of race-neutral means to increase MBE participation in city contracting. 488 U.S. at 507. The Court noted that many of the barriers to MBE participation in construction, upon which the City relied to justify a race classification, appeared to be race neutral. "If MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiorari*, lead to greater minority participation." *Id.* (emphasis added).

This language suggests that "narrow tailoring" requires not merely the consideration of race-neutral means, but their adoption. Thus *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972), held that government cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Laws affecting constitutional rights must be drawn with precision and tailored to serve their legitimate objectives. "And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' " *Id.*

Here, City considered *and rejected* "less drastic" measures. Thus, in General Finding 13, Section 12D.2, App. C 8, the Ordinance states that the Board also considered whether to: (1) create a special revolving fund to assist newly established MBE/WBEs to meet bonding and other fee-related requirements, and (2) relax or waive bonding requirements on certain contracts to facilitate MBE/WBE participation. The Board found these "less drastic" measures not feasible because of City budgetary constraints and the opposition of segments of the local business community. *Id.* Rather than apply strict scrutiny, the court accepted these excuses, stating that strict scrutiny does not require exhaustion of every possible such race-neutral alternative, " 'however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.' " App. A 38-39.

As to the applicability of waiver provisions, the court cited Ordinance § 12D.13 as allowing businesses to request "waivers in particular circumstances, including where MBEs or WBEs are unavailable." App. A 41. In

fact, the MBE waiver provisions of Section 12D.13 apply only when needed goods or services are available only from a non-MBE or if the City department certifies in writing that the contract is necessary to respond to an emergency which endangers health and safety and there is no time to apply the bid preference and no MBE capable of performing the emergency work is immediately available. App. C 34-35. In other words, the City may waive the MBE preference only when there are no MBEs.

2. San Francisco's MBE Plan Is Tied Inextricably to Race-Based Quotas

The Ninth Circuit found that rather than the rigid quota system overturned in *Croson*, San Francisco has adopted a more modest system of bid preferences in which there are no goals, quotas, or set-asides. App. A 39. That is simply not the case. The Ordinance makes plain that City is committed to race quotas. Thus the Ordinance in its appendix sets forth specific citywide participation "goals" for each ethnic group by specified contractor areas. Ordinance § 12D.6(A)4 declares that the Ordinance's "remedial measures," *i.e.*, the bid preferences, will continue to be enforced until MBE "participation in City prime contracts has reached parity with their numbers in the relevant business community." App. C 17-18. Section 12D.15(E) of the Ordinance provides that it will expire June 30, 1992, unless the City Human Rights Commission, after conducting public hearings, finds that the purposes identified in Section 12D.3 have not yet been achieved. App. C 40. Section 12D.3 in

turn provides in pertinent part: "City will continue to rely on the relationship between the percentages of minority (each ethnic group identified as a minority) . . . owned businesses . . . and their respective shares of City contract dollars as a measure of the effectiveness of this Ordinance in remedying the effects of the aforementioned discrimination." App. C 9. This means that the City will continue to extend the bid preferences until parity for each identified minority group has been reached. This tying of the measure of the remedy to the precise proportion of MBEs in the community constitutes racial balancing in its purest form. Yet the 30% goal of the Richmond plan was rejected by the Supreme Court for this very reason. "[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson*, 488 U.S. at 507. Because the San Francisco Ordinance's "remedy" is one solely of racial balancing, it similarly "cannot be said to be narrowly tailored" and, in holding otherwise, the Ninth Circuit ruling conflicts with the command of *Croson*.

3. The Ordinance's Bid Preferences Are Not Narrowly Tailored in That Neither the Type of Remedy nor Its Amount Have Any Relation to Past Discriminations

The Ninth Circuit found that the San Francisco ordinance "remedies only specifically identified discrimination: the City provides preferences only to those minority

groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest." App. A 39-40. The court further held that AGCC was unlikely to prevail on its argument that tailoring the remedy to specific minority groups is insufficient and that in order to be constitutional any remedy adopted must provide redress only to specific individuals who have been identified as victims of discrimination. The Court cited with approval the District Court's ruling that " 'an iron clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race conscious remedy superfluous.' " App. A 40 n.12.

The Ordinance defines "MBE," in pertinent part, as an economically disadvantaged local business which is owned and controlled by one or more minority persons. Section 12D.5, App. C 15. "Minority" is defined to include Asians, Blacks, and Latinos. App. C 14. "Economically disadvantaged" is defined as "a business whose average gross annual receipts in the three fiscal years immediately preceding its application for certification as a MBE . . . does not exceed the following limits: (1) Public Works/Construction—$14 million." App. C 12.

In defining MBEs as economically disadvantaged, local businesses owned by members of the preferred minority groups, the Ordinance fails to meet the standards set by *Croson*. This Court there objected to the fact that the Richmond plan "focuses solely on the availability of MBEs; there is no inquiry into whether or not the *particular* MBE seeking a racial preference has suffered from the effects of past discrimination by the city or

prime contractors." 488 U.S. at 508 (emphasis added). Here the preference is granted to *any* San Francisco-based "economically disadvantaged" MBE, whether or not it has previously done work in or with the City and therefore had an opportunity to be victimized by discrimination. Ordinance § 12D.8(B)2, App. C 21-22. MBEs are defined not in terms of actual discrimination, but strictly in terms of race or color and local residence. City's only concession to the possibility of past discrimination against the individual MBE is its concept of "economically disadvantaged." But when the phrase is defined in terms of businesses that have averaged up to $14 million a year over the past three years, it is hard to attach a great deal of constitutional credence to it. It is quite possible to slip below the $14 million benchmark as a result of factors other than prior discrimination. The Ordinance thus fails the *Croson* test in that it "focuses solely on the availability of MBEs; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors." 488 U.S. at 508.

The critical defect of City's bid preference is that it focuses upon groups rather than the individual. The lower court's ruling rejecting the requirement of individualized discrimination contravenes both *AGCC I* and *Croson*. "As the Court has noted, 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.' " *AGCC I*, 813 F.2d at 935 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

This emphasis on individual rights was stressed by *Croson*.

> "Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." 488 U.S. at 508.

Apparently for the sake of administrative convenience, City has foregone the bureaucratic effort to restrict eligibility for the bid preference to those individuals, of whatever ethnic background, who have truly suffered prior discrimination. While this may be the easy way, it is neither a narrowly tailored nor a constitutionally permissible one.

That the bid preference is motivated less by a desire to rectify past discrimination than to advance local political interests is shown by its scope. Only *local* MBE/WBEs, or joint ventures controlled by *local* MBE/WBEs, are eligible for the 10% bid preference. Ordinance § 12D.8(B)2, App. C 21-22. This limitation of bid preference to local MBEs is redundant, as the term "MBE" is itself defined as a *local* business controlled by minority persons. Ordinance § 12D.5. App. C 15. If discrimination on the basis of race had truly occurred, and there is no credible evidence of it in the Ordinance, City's remedy suggests that such discrimination occurred only to *local* MBEs and not to MBEs sited outside the city limits. As *Croson* noted in criticizing Richmond's misuse of statistics, such a limited

scope "actually suggested 'more of a political than a remedial basis for the racial preference.' " 488 U.S. at 485.

4. The Chosen Remedy Does Nothing to Correct the Purported Violations

The Ordinance's lack of narrow tailoring becomes most apparent when comparing the "remedy" with the "violations" it purports to correct. The identified violations listed are inconsistent application of uniform standards in the award of City contracts and a continuation of an "old boy network" constituting a closed business system created and implemented by the City. General Findings 6 and 10, Section 12D.2, App. C 5, 7. The only other perceived "violations" are vaguely alluded to by such undefined terms as "discrimination," "exclusion," or "insensitivity." General Findings 4, 5, 10, and 11, Section 12D.2, App. C 4-7, Public Works/Construction Findings 1-4, Section 12D.9, App. C 26-27.

The courts below, rather than focusing on the inadequacy of City's own findings, searched the legislative record to find allegations that MBEs were denied contracts despite being the low bidder, or that qualified MBE firms were told they were not qualified, were refused work even after awarded the contracts as low bidder, or that there was harassment by City officials against MBEs to discourage them from bidding on City contracts. App. A 34. Even without a strict scrutiny standard it is apparent that City's chosen remedy is utterly irrelevant to these alleged violations. A 10% bid preference can do nothing to help those who are already the lowest bidder but are denied contracts for other reasons or who are

harassed by city officials once they have received the contract.

The narrowly tailored remedy for such violations would be to correct them directly. "Each of these problems was capable of a direct, specific response, having far less dramatic effects on individual rights than the remedies actually adopted." *AGCC I*, 813 F.2d at 938. This would most logically be done by referring any such instances that actually occurred to the city attorney for appropriate action as required by City Charter § 7.206. *Croson*, 488 U.S. at 502 n.3, expressed concern over the silence of the record concerning enforcement of the city's own antidiscrimination ordinance as casting doubt on the existence of the alleged discrimination.

Croson noted that Richmond had an ordinance on the books prohibiting discrimination in the award of public contract and employment discrimination by public contractors:

> "The city points to no evidence that its prime contractors have been violating the ordinance in either their employment or subcontracting practices. The complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance flies in the face of the . . . vision of a 'tight-knit industry' which has prevented blacks from obtaining the experience necessary to participate in construction contracting." *Id.*

Similarly, the legislative record in this case, in showing City's nonenforcement of its antidiscrimination laws, suggests either that significant discrimination is not

occurring, or the City has not tried the directly responsive, narrowly tailored remedy of enforcing its antidiscrimination laws. The Ninth Circuit, however, ignored AGCC's emphasis on this point.

Nonetheless, if the perceived problem is discrimination by City employees against MBE prime contractors, the solution is either to enforce existing antidiscrimination laws or, if those are inadequate, to enact and enforce new antidiscrimination laws. Enactment of a bid preference does nothing to solve discrimination by City employees. The Ordinance ignores the obvious, logical, and constitutionally required remedy of enforcement or enactment of antidiscrimination laws. Instead, it chooses the constitutionally suspect remedy of providing a 10% bid preference to all local MBE firms who have managed to gross less than an average of $14 million annually over the three previous years, regardless of whether such firms may have suffered prior discrimination.

The Ninth Circuit ignored *Croson's* warning:

> "But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. The history of racial classifications in the country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." 488 U.S. at 500-01 (citations omitted).

The bid preference, in making no attempt to correct the perceived problems, loses its status as a "remedy" and instead becomes a sanction levied against all non-MBE contractors, solely on the basis of their race. As such, the preference is not narrowly tailored to correct any prior statutory or constitutional violations, but instead itself violates the rights of the nonpreferred contractors by resorting to a race-based quota.

CONCLUSION

AGCC therefore respectfully urges this Court to grant this petition and reverse the Ninth Circuit's denial of AGCC's motion for preliminary injunction as prayed for against enforcement of San Francisco's Minority/Women/Local Business Utilization Ordinance.

DATED: February, 1992.

Respectfully submitted,

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APPENDIX

APPENDIX A*

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., a nonprofit California corporation, *Plaintiff-Appellant,* v. COALITION FOR ECONOMIC EQUITY, et al., *Defendants-Intervenors-Appellees,* and CITY AND COUNTY OF SAN FRANCISCO, *Defendants-Appellees.*	No. 90-16582 D.C. No. CV-89-4454-TEH OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
March 15, 1991 – San Francisco, California

Filed December 6, 1991

Before: Betty B. Fletcher, David R. Thompson and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Fletcher, Concurrence by
Judge O'Scannlain

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*Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original document appeared.

SUMMARY

Constitutional Law/Injunctions

Affirming a district court denial of a preliminary injunction enjoining enforcement of San Francisco's Minority/Women/Local Business Utilization Ordinance applicable to prime construction contracts, the court of appeals held that an organization of contractors having substantial numbers of members not within the classes granted bid preference failed to demonstrate that the balance of hardships tip sharply in its favor, or a sufficient likelihood of success on the merits.

In 1989, the City and County of San Francisco adopted an ordinance giving bid preferences to prime contractors who are minority-owned business enterprises, women-owned business enterprises, or locally-owned business enterprises within the city's geographical area. In addition, the City enacted a separate ordinance that raised the threshold for competitive bidding for city contracts from $50,000 to $10,000,000. This ordinance was enacted pursuant to an amendment to the city charter passed the prior year, by which the electorate authorized the City's Board of Supervisors to increase or decrease the competitive bidding threshold. Soon after the effective dates of the 1989 ordinance and the competitive bidding threshold ordinance, appellant Associated General Contractors of California, Inc. (AGCC), sought a preliminary injunction. AGCC's preliminary injunction motion challenged both the constitutionality of the MBE provisions of the 1989 ordinance insofar as they pertain to public works constructions contracts and the validity

under state law of the competitive bidding threshold ordinance. The district court denied AGCC's motion for preliminary injunction.

The court determined that AGCC had standing to pursue this action. However, the court concluded that AGCC failed to demonstrate that is was likely to succeed on the merits of the charter issue; at most AGCC raised serious questions on the merits. In this case, the hardships that would be caused to women and minorities by issuance of a preliminary injunction barring implementation of the 1989 ordinance in combination with the City's important interest in remedying discriminatory practices had to weigh against any hardships incurred by AGCC. In balancing these interests, the court concluded that AGCC failed to make the requisite showing that the balance of hardships tipped sharply in its favor.

The court also found that while California law emphatically prohibits the City from amending its charter, it does not provide guidance to aid in the determination of whether the bidding threshold ordinance challenged here was to be deemed such an unlawful amendment to a charter. The court concluded, however, that AGCC failed to demonstrate that a sufficient probability exists that the charter ordinance would be found to violate the California Constitution.

The court did not need to determine whether AGCC's allegations of constitutional infringement would be entitled to a presumption of harm. Instead, the court found that, whether or not AGCC would be entitled to such a presumption, it did not demonstrate a sufficient

likelihood of success on the merits of its own constitutional claims to warrant the grant of a preliminary injunction.

The court noted that in contrast to the "mere recitation of a 'benign' or legitimate purpose" criticized by the Supreme Court in *Croson*, the record in this case disclosed that the City made detailed findings of prior discrimination in construction and building within the City's borders. The City had also found discrimination in the private sector against minority and women-owned business enterprises that was manifested and exacerbated by the City's procurement practices. The City's findings appeared supported by the record. In addition, the record docmented a vast number of individual accounts of discrimination that brought the cold numbers convincingly to life. The record in this case indicated that San Francisco is likely to demonstrate a strong basis in evidence supporting its decision to adopt a race-conscious plan. The record also indicated that the City has attempted to use race-neutral means to address the problem of discrimination. Inclusion of such race-neutral measures is one factor suggesting that a minority business enterprise plan is narrowly tailored. The ordinance at issue also appeared to possess the requisite flexibility necessary to withstand a motion for preliminary injunction. That the 1989 ordinance is limited in its geographical scope to the boundaries of the enacting jurisdiction also increased its likelihood of being sustained on the merits.

Judge O'Scannlain concurred specially. While he agreed with his colleagues that the district court properly denied AGCC's request for preliminary injunctive relief, he could not concur in their analytical approach.

COUNSEL

John H. Findley, Pacific Legal Foundation, Sacramento, California, for the plaintiff-appellant.

William C. McNeill, III, Employment Law Center, San Francisco, California, for the intervenors-appellees.

Mara E. Rosales, Deputy City Attorney, San Francisco, California, for the defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

We confront once again the tension between the efforts of the City and County of San Francisco ("the City") to ameliorate the effects of past discrimination in City contracting processes on disadvantaged groups and the constraints imposed by the Fourteenth Amendment's guarantee of equal treatment to all citizens, as well as other provisions of state and federal law. Appellant, Associated General Contractors of California, Inc. ("AGCC"), appeals the district court's denial of its motion for a preliminary injunction enjoining the enforcement of San Francisco's Minority/Woman/Local Business Utilization Ordinance – II, No. 175-89 ("1989 Ordinance") insofar as it applies to prime construction contracts. We affirm.

FACTS

The challenge to San Francisco's use of racial and gender preferences to remedy discrimination in city

contracting dates back more than seven years. In April 1984, the San Francisco Board of Supervisors (the "Board") passed the Minority/Women/Local Business Utilization Ordinance, No. 139-84 ("1984 Ordinance"), which required the City to set aside designated percentages of its contracting dollars to minority-owned business enterprises ("MBEs") and women-owned business enterprises ("WBEs"). In addition, the 1984 Ordinance required that MBEs, WBEs and locally- owned business enterprises ("LBEs") receive a five percent bidding preference to be taken into account when the City calculated the low bid on city contracts.

AGCC, an organization of contractors engaged in the building and construction industry, which has substantial numbers of members who are not within the classes granted preferences by the 1984 Ordinance, challenged the implementation of the 1984 Ordinance in court. In reviewing the ordinance, this circuit upheld the provisions favoring WBEs and LBEs against AGCC's constitutional challenge but invalidated the provisions favoring MBEs. *AGCC v. City and County of San Francisco*, 813 F.2d 922, 928-44 (9th Cir. 1987) *petition dismissed*, 110 S.Ct. 296 (1989) (*AGCC I*). In addition, we ruled that all bidding preferences, insofar as they applied to contracts over $50,000, violated San Francisco City Charter section 7.200, which required that contracts over $50,000 be given to the "lowest reliable and responsible bidder." *Id.* at 927-928.

Shortly after our decision in *AGCC I*, the Supreme Court considered a similar minority set-aside plan in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In that decision, a deeply divided Supreme Court struck down the racial set-aside plan adopted by the city of Richmond,

Virginia.[1] At the same time, however, the Court confirmed that municipalities could employ race-conscious remedies to redress discrimination in certain circumstances. *Id.* at 509 (Rehnquist, C.J., O'Connor, J., White, J., Kennedy, J.); *Id.* at 511 (Stevens, J.); *Id.* at 528 (Marshall, J., Brennan, J., Blackmun, J.). Prior to *Croson*, the City had been investigating continued discrimination in city contracting. In that capacity, it had received, among other information, testimony from 42 witnesses, and written submittals from 127 minority, women, local, and other business representatives. Subsequently, in an attempt to determine whether *Croson's* criteria for permitting race-conscious ordinances were met with respect to San Francisco, the City held an additional ten public hearings, commissioned two statistical studies, and sought written submissions from the public. Out of this process emerged the 1989 Ordinance now before this court. It became effective on July 1, 1989 and may be cited as SF admin. Code, Ch. 12D.

Rather than providing the set-asides mandated by the 1984 Ordinance, the 1989 Ordinance gives bid preferences to prime contractors who are members of groups

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[1] The decision produced no single opinion that reflected the majority's views. Instead, Justice O'Connor announced the judgment of the Court and delivered the opinion of the Court with respect to several portions of an opinion in which Chief Justice Rehnquist, and Justices White, Stevens, and Kennedy joined. Other portions of Justice O'Connor's opinion were joined by Judges Rehnquist, White, and Kennedy. Both Justices Stevens and Kennedy filed opinions concurring in part and concurring in the judgment. Justice Scalia filed an opinion concurring in the judgment. Justices Brennan, Marshall, and Blackman dissented from the result reached by the majority.

found disadvantaged by previous bidding practices. Specifically, the Ordinance provides a five percent bid preference for LBEs, WBEs, and MBEs. Because the WBE and MBE preferences are treated cumulatively with the LBE preferences under the ordinance, local MBEs and WBEs become eligible for a ten percent total bid preference, representing the cumulative total of the five percent preference given LBEs and the 5% preference given MBEs and WBEs. § 12D.8(B)(2). The Ordinance defines "MBE" as an economically disadvantaged business that is owned and controlled by one or more minority persons. § 12D.5. "Minority" is defined to include Asians, Blacks, and Latinos. "WBE" is defined as an economically disadvantaged business that is owned and controlled by one or more women. "Economically disadvantaged", insofar as the term applies to public works construction contracts, is defined as a business whose average gross annual receipts in the three fiscal years immediately preceding its application for certification as a MBE does not exceed fourteen million dollars. The Ordinance allows non-MBEs and non-WBEs to benefit from the bid preferences given these groups by extending a five percent preference to those who engage in a joint venture with a local MBE or WBE provided the MBE's or WBE's participation is between 35% and 51%. § 12D.8(B)(2). Those who engage in a joint venture with a local MBE or WBE whose participation is 51% or more, receive a ten percent preference. *Id.* A waiver of the bid preference is provided where no MBE or WBE is available to provide the necessary goods or services. § 12D.13. Subsequent to the passage of the 1989 Ordinance, the Board enacted Ordinance No. 424-89, which raised the threshold for competitive bidding for

city contracts previously set at $50,000 by section 7.200 of the San Francisco City Charter, to $10,000,000 ("the competitive bidding threshold ordinance"). Ordinance No. 424-89 was enacted pursuant to an amendment to the city charter passed the prior year, by which the electorate authorized the Board of Supervisors to increase or decrease the competitive bidding threshold. After the implementation of the new bid threshold ordinance, contracts valued at over $10,000,000 would still be subject to the city charter's "lowest reliable and responsible bidder" requirement. Contracts below that level presumably would be subject to the new bid preference system.

Soon after the effective dates of the 1989 Ordinance and the competitive bidding threshold ordinance, AGCC filed this action and sought a preliminary injunction. The motion for preliminary injunction challenges both the constitutionality of the MBE provisions of the 1989 Ordinance insofar as they pertain to public works construction contracts and the validity under state law of the competitive bidding threshold ordinance.[2] In a well-reasoned opinion, the district court denied the motion for preliminary injunction. Although the district court held that the alleged violation of the constitutional rights of AGCC's members would, if meritorious, produce irreparable injury, it found that plaintiffs were unlikely to prevail on their constitutional claim. It rejected, AGCC's charter claim based on its finding that AGCC had failed to demonstrate the requisite possibility of irreparable

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[2] The action does not challenge the lawfulness of provisions of the ordinance relating to purchase or service contracts or those providing preferences favoring LBEs.

injury. AGCC now appeals the district court's denial of its motion for preliminary injunction to this court.

DISCUSSION

Because the grant or denial of a preliminary injunction lies within the discretion of the district court, our review of the denial of a preliminary injunction is limited. *Johnson Controls, Inc. v. Phoenix Control Sys.*, 886 F.2d 1173, 1174 (9th Cir. 1989); *Big Country Foods, Inc. v. Board of Educ.*, 868 F.2d 1085, 1087 (9th Cir. 1989). We will reverse the denial of a preliminary injunction only if the district court abused its discretion or relied on an erroneous legal premise or clearly erroneous findings of fact. *Johnson Controls*, 886 F.2d at 1174; *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). We review de novo the correctness of the legal standards employed by the district court in evaluating the plaintiff's likelihood of success on the merits.

I. *AGCC's STANDING TO PURSUE THIS ACTION*

As an initial matter, Appellees-Intervenors The Coalition for Economic Equity, *et al.* ("Intervenors"), argue that this case fails to present a case or controversy for Article III purposes because AGCC lacks standing to sue on behalf of its members. This issue was not raised below. However, because a "threshold question in every federal case" is "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), this issue must be resolved before we may

review the district court's denial of the motion for preliminary injunction. *See also Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (opinion of Marshall, J.) (standing issue governs appellate jurisdiction as well as trial court jurisdiction).

In order for an organization to have representational standing to sue on behalf of its members, it must meet the three-pronged test set out by the Supreme Court in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977).[3] The organization must establish that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. The second prong of the test is not at issue here; the interest of AGCC in preserving favorable conditions for bidding by its members is clearly germane to the organization's purpose. *See* Complaint at ¶ 3 ("AGCC exists for the purpose, among others, of fostering, promoting, and protecting the common interests of its member contractors and subcontractors in the construction industry in California."). However, the first and third prongs of the test raise issues that we must now resolve.

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[3] An organization may also have standing to sue on its own behalf. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975). Because we find that AGCC had standing to assert the rights of its members, however, we do not consider whether AGCC may have standing to seek judicial relief stemming from its own injury.

The Intervenors argue that no AGCC member would have standing individually to bring these claims because no member has asserted a sufficient risk of injury. The Intervenors point out that the record evidence indicating that any of AGCC's members will suffer injury stemming from the 1989 Ordinance is limited to a declaration from one AGCC member stating that the ordinance has discouraged him from bidding on San Francisco contracts and AGCC's more general assertions that the ordinance could cause its members to lose contracts for which they are bidding.[4] The Intervenors contend that such assertions are insufficient to confer standing upon any of AGCC's members, and therefore upon AGCC.

It has long been "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action . . . ." *Ex parte Levitt*, 302 U.S. 633, 634 (1937). This requirement is necessary to ensure that federal courts reserve their judicial power for " 'concrete legal issues, presented in actual cases, not abstractions.' " *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947) (quoting *Electric Bond & Share Co. v. Securities & Exchange Comm'n*, 303 U.S.

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[4] The record contains a number of other declarations from AGCC members detailing the injuries caused by San Francisco's MBE ordinance. These declarations, however, relate solely to the injury caused by the 1984 Ordinance. Because of the significant differences between the 1984 and 1989 Ordinances, detailed *supra*, we decline to assume that any injury that may have been caused by the 1984 Ordinance would also be caused by the 1989 Ordinance.

419, 443 (1938)). To meet this requirement, "[a] hypothetical threat is not enough." *Id.* at 90.

A long line of Supreme Court cases delineate the type of injury or risk of injury deemed so remote or hypothetical as to be insufficient to confer standing. In *Laird v. Tatum*, 408 U.S. 1 (1972), for example, the Supreme Court held that no case or controversy existed on respondent's challenge to the Department of the Army's program involving surveillance of civilian political activities. Respondents in that case admitted that there was no indication that the Army had the respondents' political activities under surveillance or that it contemplated such surveillance in the foreseeable future; they claimed, however, that the knowledge that the Army might do so "chilled" their political expression. The Court noted that, while it had previously found a case or controversy to exist merely from the chilling effect of governmental regulations,

> [i]n none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.
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> . . .

> The respondents do not meet this test; their claim, simply stated is that . . . the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights. . . . Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . . .

Id. at 11, 13-14 (emphasis in original). Similarly, in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), the Supreme Court found no case or controversy presented where plaintiffs sought an injunction to prohibit the government from enforcing the Hatch Act's bar on political activity by government employees, 18 U.S.C. § 61h, but had neither yet violated the act by participating in political activity nor asserted firm plans to do so in the future. *Id.* at 86-91; *see also, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 101-05 (1983) (plaintiff previously subjected to police stranglehold lacked standing to seek injunctive relief because no showing that he was likely to be exposed to future police brutality); *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (plaintiffs challenging alleged discriminatory bail-setting, jury selection, and sentencing lacked standing to seek injunction because no showing that they were likely to be arrested and subjected to the challenged practices); *Golden v. Zwickler*, 394 U.S. 103, 108-09 (1969) (plaintiff previously convicted for distributing anonymous handbills in past election campaign but whose being subjected to statute in future was "most unlikely" lacked standing to seek declaratory relief for future campaigns).

We believe that the injury asserted here is sufficient to confer standing on AGCC. In all cases in which the

Supreme Court denied standing because the injury was too speculative there was either little indication in the record that the plaintiffs had firm intentions to take action that would trigger the challenged governmental action, or little indication in the record that, even if plaintiffs did take such action, they would be subjected to the challenged governmental action. Here, by contrast, the record indicates that AGCC members have firm intentions to bid for San Francisco city contracts, and that the application of the ordinance to such city bids is compulsory in nature. *See Coral Const. Co. v. King County*, 941 F.2d 910, 929-30 (9th Cir. 1991). The mere fact that AGCC members cannot play on an even field against MBEs subjects them to a legally cognizable injury: "[a]s a result of the objectively unequal bidding process under the preference method of awarding contracts, an injury results not only when [a non-MBE] actually loses a bid, but every time the company simply places a bid." *Id.* at 930. Moreover, the chill alleged by AGCC to result from the ordinance, because the ordinance is compulsory in nature, must also be deemed a legally cognizable injury. *Cf. Del Percio v. Thornsley*, 877 F.2d 785, 787 (9th Cir. 1989) (plaintiff's "generalized claim that [challenged] statute's very existence has an inhibiting effect on her exercise of her right[s]", in absence of likelihood that statute will be applied to plaintiff, insufficient to confer standing). Accordingly, we find that AGCC meets the first prong of the *Hunt* test.[5]

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[5] For the same reasons that we find this injury not to be so speculative as to warrant denial of standing, we reject any

(Continued on following page)

Neither do we find that the third prong of the *Hunt* test, the requirement that the suit not demand "the participation of individual members," bars AGCC from standing in this court. We have previously found this requirement to be met when the claims proffered and relief requested do not demand individualized proof on the part of its members. *Compare United Union of Roofers v. Insurance Corp. of America*, 919 F.2d 1398, 1400 (9th Cir. 1990) (denying standing because "individual Union members will have to participate at the proof of damages stage") *with Alaska Fish & Wildlife Fed'n v. Dunkle*, 829 F.2d 933, 938 (9th Cir. 1987) (allowing standing "because the [organization] seeks declaratory and prospective relief rather than money damages [and thus] its members need not participate directly in the litigation"). Because neither AGCC's claims nor their request for declaratory and injunctive relief require such individualized proof, under this interpretation of *Hunt's* third prong, the organization must be deemed to have standing.

(Continued from previous page)

claim that the issues presented here are not ripe for review because the case involves uncertain future events. The ordinance challenged in this suit is currently in effect; those determining whether to bid on city contracts are currently basing their decisions on its existence. Thus, the ordinance's effects are not confined to the future. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736 n.15 (1980) (consumer group that found attorney unwilling to supply information requested for legal services directory because of state bar rule against advertising had established a case or controversy ripe for review with the state supreme court in its capacity as an enforcing agency); C. Wright, A. Miller, & E. Cooper, 13A *Federal Practice & Procedure* § 3532.2 (2d ed. 1984).

In a post-argument submission to this court, the Intervenors call to our attention *Maryland Highways Contractors Association v. Maryland*, 933 F.2d 1246 (4th Cir. 1991), *petition for cert. filed* Aug. 19, 1991, in which the United States Court of Appeals for the Fourth Circuit dismissed a similar action for lack of standing. In that case, the court found that an association of contractors seeking to challenge a minority business enterprise statute lacked standing to bring suit on behalf of its members, among other reasons, on the basis of a different interpretation of *Hunt's* third prong than that previously used by our circuit. According to the Fourth Circuit, "[t]his prong is not met when conflicts of interest among members of the association require that the members must join the suit individually in order to protect their own interests." *Id.* at 1252. The Fourth Circuit denied standing on the ground that

> the members of the Association in this case have conflicting interests. Some of the members of the Association are certified MBEs; they benefit from the continued enforcement of the MBE statute. Other non-minority members of the Association would benefit if the MBE statute were declared unconstitutional. Thus, there are actual conflicts of interest which would require that the individual members come into the lawsuit to protect their interests.

Id. at 1253; *see also Associated Gen. Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 691 (8th Cir. 1979) (denying organization representational standing because organization's members' "status and interests are too diverse and

the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members").

We reject the invitation to expand our interpretation of *Hunt's* third prong to require that no actual or potential conflict exist between the organization's members for several reasons. First, we do not believe that the Supreme Court intended this requirement to be included in *Hunt's* third prong. In *Hunt*, the Supreme Court found that the Washington Apple Advertising Commission, a Washington state agency formed to promote apple sales, had standing to contest a North Carolina law restricting the labeling of containers in which apples were shipped. The Court found the third prong of the test met simply because "neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context." 432 U.S. at 344. The Court never inquired into whether the apple growers and dealers represented by the Commission would unanimously agree to the position taken by the Commission in the suit. Similarly, in *UAW v. Brock*, 477 U.S. 274 (1986), the Supreme Court found that a union had standing to sue on behalf of its workers to challenge the Secretary of Labor's interpretation of the Trade Act of 1974. Again, in finding the third prong of the test met, the Court sought only to determine that no individualized proof was required: "Neither [the Union's] claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved UAW member. The suit raises a pure question of law: whether the Secretary properly interpreted the

Trade Act's TRA eligibility provisions." *Id.* at 287. Moreover, in no other case in which the Supreme Court has cited *Hunt* has it sought to impose a condition of unanimity on an organization's members.

In addition, we believe that the Supreme Court implicitly decided the issue of whether unanimity of membership should be required for standing in *UAW v. Brock*. In that case, the Secretary urged that the *Hunt* test be overruled and that, instead, the Court apply the rules for class actions set out in Federal Rule of Civil Procedure Rule 23 on the ground that only the class action rules "contain[] special safeguards to ensure that the diverse interests of class members are properly represented by the named plaintiff seeking to bring a case on their behalf . . . [while] [n]o such adequacy of representation . . . is guaranteed by the approach this Court has taken to associational standing." *Id.* at 288-89. The Court rejected the Secretary's argument based on its recognition of the special advantages derived from allowing associations to bring suit, advantages which provide benefits "both to the individuals represented and to the judicial system as a whole." *Id.* at 289. According to the court, "[w]hile a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital." *Id.* The Court stated that it was not "prepared to dismiss out of hand the Secretary's concern that associations allowed to proceed under *Hunt* will not always be able to represent adequately the interests of all their injured members," but concluded that the proper

remedy in such a situation would be to deny claim preclusion against members of "an association . . . deficient in this regard" or to adopt some other remedy short of requiring unanimity. *Id.* at 290. While the Court did not explicitly rule that it would impose no requirement of unanimity on organizations seeking associational standing, its statements in *Brock* clearly counsel against imposition of such a standard.

Furthermore, as a matter of policy, we reject the suggestion that unanimity of membership be required in organizations seeking standing. Most organizations are formed with far broader purposes than could be represented by a single piece of legislation or other policy challenged. Unanimous opinions within an organization's membership will be few and far between with regard to most issues controversial enough to engender litigation. To insist that there be neither conflict nor potential for conflict on any issue litigated would, in effect, lead to the eradication of associational standing in most suits. Such a rule would disserve the public interest, which frequently would not be represented but for these suits.

Accordingly, we conclude that an organization's internal conflicts properly should be resolved through its own internal procedures, not through limitations on standing. Our ruling should not be deemed to allow the silencing of dissenters' voices within an organization: the interests of these dissenters should be taken into account either through liberal approval of their intervention in the lawsuit or, as the *Brock* Court suggested, through refusal to preclude subsequent claims by dissenting members. *Accord National Maritime Union v. Commander, Military Sealift Command*, 824 F.2d 1228, 1231-34 (D.C. Cir.

1987); *cf. Gillis v. Dep't of Health & Human Servs.*, 759 F.2d 565, 572-73 (6th Cir. 1985). However, so long as the position taken in litigation has the clear mandate of the association represented, standing should not be denied.

II. *THE MOTION FOR PRELIMINARY INJUNCTION*

We next consider whether the district court properly denied AGCC's motion for preliminary injunction. To obtain a preliminary injunction, the moving party must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975) (emphasis in original). "These formulations are not different tests but represent two points on a sliding scale in which the degree or irreparable harm increases as the probability of success on the merits decreases." *Big Country Foods*, 868 F.2d at 1088. Under either formulation of the test, the party seeking the injunction must demonstrate that it will be exposed to some significant risk of irreparable injury. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668 (9th Cir. 1988). A plaintiff must do more than merely allege imminent harm sufficient to establish standing, he or she must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). Here, AGCC charges that the district court should have entered a preliminary injunction on both its charter claim and its equal protection claim. We analyze each claim separately.

A. *AGCC'S Charter Claim*

Prior to the passage of the 1989 Ordinance, City Charter 7.200 provided:

> When the expenditure for any public work . . . shall exceed the sum of . . . fifty thousand dollars ($50,000), the same shall be done by contract. . . . The head of the department in charge of or responsible for the work for which a contract is to be let, . . . shall let such contract to the lowest reliable responsible bidder.

In 1986, by vote, the City's residents amended the section to add the following language:

> Beginning with fiscal year 1987-88, the board of supervisors shall be authorized to increase or decrease by ordinance the dollar amount set forth in any provision in this section.

On the basis of the amended provision, the Board enacted the bidding threshold ordinance, which raised the competitive bidding threshold from $50,000 to $10,000,000, thereby allowing the bid preference system established in the 1989 Ordinance to become effective for bids under $10,000,000.

AGCC argues that both the bidding threshold ordinance and the amendment to section 7.200 violate the California constitution, which mandates that all amendments to city charters be made by vote of the city's residents. The court below denied AGCC's motion for preliminary injunction on the charter claim based on its finding that AGCC had failed to demonstrate a sufficient risk of irreparable injury. The court found that, as a factual matter, an insufficient risk of injury was presented

because no AGCC member asserted denial of a contract due to the MBE provisions and only one member asserted that he was deterred from bidding by the Ordinance. It also found that any injury suffered by AGCC's members would be pecuniary and redressable at law. Because of its finding on the issue of irreparable injury, the district court did not consider the likelihood that AGCC would prevail on the merits of its charter claim. On appeal, AGCC challenges the district court's conclusion.

1. *Possibility of irreparable injury*

AGCC argues that the district court erred in concluding that it failed to demonstrate a sufficient possibility of irreparable injury. According to AGCC, as a factual matter, it had demonstrated far more than a slight possibility that its members would suffer injury. AGCC also contends that the district court erred as a matter of law in determining that any injury suffered could be compensated by money damages and was therefore not irreparable.

We need not determine whether any injury suffered would be irreparable. We determine only that, if any irreparable injury were suffered, it would not be so great as to require issuance of a preliminary injunction given our preliminary assessment of the merits. As stated *infra*, we find that AGCC has failed to demonstrate that it is likely to succeed on the merits of the charter issue; at most, it has raised serious questions on the merits. Thus, to warrant the issuance of a preliminary injunction, AGCC must demonstrate that the balance of hardships tips sharply in its favor. In this case, the hardships that

would be caused to women and minorities by issuance of a preliminary injunction barring implementation of the 1989 Ordinance in combination with the City's important interest in remedying discriminatory practices must be weighed against any hardships incurred by AGCC. In balancing these interests, we conclude that AGCC has failed to make the requisite showing that the balance of hardships tips sharply in its favor.

2. *Likelihood of success on the merits*

The basic outlines of California law on the issue of charter amendments are clear. California Constitution article XI, section 3, provides that a county or city may adopt a charter by majority vote of its electorate voting on the question and amend the charter in the same manner. According to the Supreme Court of California, this procedure "is exclusive and controlling, and any charter provision in conflict therewith is invalid." *Uhl v. Collins*, 217 Cal. 1, 17 P.2d 99 (1932); *see also Alexander v. Mitchell*, 119 Cal. App. 2d 816, 260 P.2d 261, 264 (Cal. App. 1953). Thus, in *Montgomery v. Board of Administration*, 34 Cal. App. 2d 514, 93 P.2d 1046 (Cal. App. 1939), the Supreme Court of California stated that San Diego's city council had no power to pass ordinances that conflicted with the city's charter, despite provisions in the charter that allowed the Board to "establish such rules and regulations as it may deem proper." According to the court, "[i]f section 146 of the charter must be construed as giving authority to the city council of San Diego by ordinance to add or subtract from the charter provisions or make regulations . . . inconsistent with the clear provisions of

that document, it must be held to be unconstitutional as attempting to permit the amendment of the charter in an unauthorized manner." *Id.* at 1049.

Despite this clear dictate of California law, application of the principle to the case at hand produces no clear results. While California law emphatically prohibits the Board from amending the charter, it does not provide guidance to aid in our determination of whether the bidding threshold ordinance challenged here should be deemed such an unlawful amendment to a charter. Left to predict how California would determine this issue, however, we conclude that while AGCC may have raised serious questions on the merits, it has not demonstrated probable success on them. In requiring that all amendments to a city charter be by vote of the people, California intended to ensure that the ultimate power to govern remained in the hands of its citizens. We are not convinced that the actions taken by the electorate and the Board implicate this concern. At argument, AGCC's counsel conceded that if the City had passed a charter amendment repealing the previous $50,000 bidding threshold and stating that Board could set a new bidding threshold within a particular range, the amendment would be legitimate. Although the charter amendment passed was less specific, it clearly was intended to accomplish exactly that.[6] *See also AGCC I*, 813 F.2d 922, 927 n.9. We therefore

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[6] AGCC also argues that Ordinance No. 424-89 is unlawful because it was passed for racially discriminatory reasons and therefore violates AGCC's members' rights to equal protection. While there is little evidence in the record regarding the

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conclude that AGCC has failed to demonstrate that a sufficient probability exists that the ordinance will be found to violate the California Constitution.

B. *AGCC's Constitutional Claims*

AGCC also contends that the preferences given to MBEs[7] violate the equal protection clause of the Fourteenth Amendment of the United States Constitution.[8]

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Board's motivations for passing the ordinance, it appears reasonable to assume that the Board passed it in order to facilitate its MBE preference scheme. However, AGCC's claims that the ordinance constitutes unlawful discrimination based on race would warrant the issuance of a preliminary injunction only if AGCC demonstrates a likelihood of success on the merits of its equal protection claims. We consider these claims *infra* at Part II.B.2.

[7] Although AGCC's charter claims challenge the preferences given to both WBEs and MBEs, its constitutional claims challenge only the preferences given to MBEs.

[8] AGCC also asserts that the MBE bid preferences violate rights secured by 42 U.S.C. § 1981 and 42 U.S.C. § 1983. Section 1983 provides a cause of action for the deprivation under color of state law of any rights, privileges, or immunities secured by the Constitution and federal laws. The rights protected by section 1983 are coextensive with the equal protection clause's guarantee against racial discrimination. *See AGCC I*, 813 F.2d at 928 n.11. Accordingly, we resolve AGCC's section 1983 claim in our discussion of the equal protection clause.

Section 1981 provides in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . . " This section

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The court below found that AGCC demonstrated the requisite possibility of irreparable injury on the ground that such injury is assumed where constitutional rights have been alleged to be violated. It denied the motion for preliminary injunction on AGCC's constitutional claim, however, on the ground that AGCC failed to demonstrate a likelihood of success on the merits. On appeal, AGCC argues that the district judge incorrectly applied relevant law in concluding that it was unlikely to prevail on its claims.

1. *Possibility of irreparable injury*

We have stated that "[a]n alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984). In this case, we need not determine whether AGCC's allegations would be entitled to such a presumption of harm.[9] Instead we find that, whether or

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prohibits discrimination against nonminorities as well as minorities. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976). We have previously noted that "[i]t is not entirely clear whether . . . section 1981[] gives protections beyond those provided by the fourteenth amendment." *AGCC I*, 813 F.2d at 928 n.11. We do not address the issue on appeal, however, as AGCC confines its legal argument to the scope of the equal protection clause. *See Brady v. Gebbie*, 859 F.2d 1543, 1557 (9th Cir. 1988) (refusing to consider argument not sufficiently argued in appellate brief); *Northwest Acceptance Corp. v. Lynnwood Equipment Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) (same), *cert. denied*, 489 U.S. 1100 (1989).

[9] We note that in *Northeastern Fla. Chapter of Ass'n of Gen. Contractors v. Jacksonville, Fla.*, 896 F.2d 1283 (11th Cir. 1990),

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not AGCC would be entitled to such a presumption, the organization has not demonstrated a sufficient likelihood of success on the merits of its constitutional claims to warrant the grant of a preliminary injunction. *See id.* (While allegations of constitutional infringement might be sufficient to presume irreparable harm, "[i]n this case, . . . the constitutional claim is too tenuous to support our affirmance on that basis.").

2. *Likelihood of success on the merits*

A city may use "some form of narrowly tailored racial preference" where such a measure is "necessary to break down patterns of deliberate exclusion." *Croson*, 488 U.S. at 509 (plurality). Indeed, "[t]he remedy for intentional discrimination often calls for race-specific relief," *Coral Const.* 941 F.2d at 921. However, "[a] race-conscious remedy without a race-based injury is constitutionally infirm." *Id.* at 10699. To "smoke out" illegitimate uses of race, the Supreme Court has directed that strict scrutiny be applied to all race-conscious programs. *Croson*, 488 U.S. at 493. To survive this test, a municipality's classifications based on race must serve a compelling state interest and must be narrowly tailored to

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the Eleventh Circuit refused to presume irreparable injury from allegations of equal protection violations when it found the primary damage that plaintiff asserted to be "chiefly, if not completely, economic." *Id.* at 1285-86. We do not consider this issue because we conclude that, whether or not irreparable injury could be presumed here, plaintiff has failed to demonstrate a sufficient likelihood of success on the merits.

further that interest. *Wygant*, 476 U.S. at 274. We discuss each prong in turn.

A. *Compelling state interest*

In *Croson*, a majority of the Supreme Court delineated the scope of discrimination that a race-conscious remedy could properly seek to redress. According to the Court, a municipality has a compelling interest in redressing, not only discrimination committed by the minicipality, itself, but also discrimination committed by private parties within the municipality's legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *See* 488 U.S. at 491-92 (Rehnquist, C.J., White, J., O'Connor, J.); *Id.* at 537-38 (Brennan, Marshall, Blackmun). To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." *Coral Const.*, 941 F.2d at 916 (citation omitted). In addition, the "[m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.*

In applying these guidelines to the race-conscious ordinance at issue in *Croson*, the Supreme Court found that Richmond's factual predicate fell short of its constitutional mark. According to the Court, the city's mere recitation of a remedial basis for its racial classifications was entitled to little or no weight. 488 U.S. at 500. Furthermore, the Court criticized allegations of proponents

of the legislation that discrimination existed in the construction industry as conclusory, unrelated to the Richmond construction industry, and to have little probative value. *Id.* at 498. The Court also faulted the city's assertions that it had a compelling interest based on the disparity in the percentage of contracts awarded to minority-owned businesses and the percentage of minorities in the city as a whole. *Id.* at 501-02. According to the Court, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualification) may have little probative value." *Id.* at 501 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977)). Finally, the Court rejected the city's attempts to bolster the ordinance's factual predicate based on Congress' finding of discrimination in the construction industry. The Court stressed that for the constraints of the equal protection clause to remain effective, states and local agencies must use their own factfinding processes to establish the presence of discrimination in their own bailiwicks. *Id.* at 504. Because Richmond offered no further justification for its assertions of past discrimination, the Court held that Richmond's plan lacked the required " 'strong basis in evidence for [the council's] conclusion that remedial action was necessary.' " *Id.* at 500 (majority opinion) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

Our decision in *AGCC I* provides further direction in our assessment of the factual predicate necessary to

justify San Francisco's race-conscious remedy.[10] In that case, this circuit found that statistics relied upon by San Francisco to support the 1984 Ordinance failed to identify discrimination with the precision required to demonstrate a compelling interest. We noted that by comparing the percentage of MBEs who received contracts from the City with the percentage of MBEs in the city at large, the City failed to take into account that a disproportionate number of MBEs in the city at large might not provide goods or services subject to significant contracting by the City; thus the disproportionate number of contracts awarded to non-MBEs might be explainable for reasons other than discrimination in the contracting process. *AGCC I*, 813 F.2d at 933-34. We also found the City's statistics to be inadequate because, although the race-conscious remedies benefited MBEs based outside of San Francisco, the City limited its statistical inquiry in determining whether non-MBEs received a disproportionate percentage of contracts to the racial makeup of San Francisco. We stated that any plan that extended race-conscious remedies beyond territorial boundaries "must be based

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[10] The declaration of the *Croson* plurality that a city "can use its spending powers to remedy private discrimination," 488 U.S. at 492 (O'Connor, J., Rehnquist, C.J., and White), in conjunction with the opinion of the three dissenting justices, *Id.* at 528 (Marshall, J., Brennan, J., and Blackmun, J.), appears implicitly to overrule our requirement in *AGCC I* that to justify a race-based preference, "the state or local government must be acting to remedy government-imposed discrimination." *AGCC I*, 813 F.2d at 930; *See Coral Const.*, 941 F.2d at 916 n.6. Nonetheless, the remainder of our discussion in *AGCC I* of the factual predicate necessary to justify race-based preferences remains precedent that is binding on this court.

on very specific findings that actions the city has taken in the past have visited racial discrimination on such individuals." *Id.* at 934

Measuring the 1989 Ordinance against these principles, we believe that AGCC has failed to demonstrate that it is sufficiently likely to prevail on the merits of its constitutional claim to warrant the issuance of a preliminary injunction. In contrast to the "mere recitation of a 'benign' or legitimate purpose" criticized in *Croson*, 488 U.S. at 500, the record in this case discloses that the Board made detailed findings of prior discrimination in construction and building within the City's borders. Based on testimony taken at more than ten public hearings and on numerous written submissions from the public, the Board found that City departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. 1989 Ordinance Ch. 12D.2. Furthermore, it found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. *Id.* According to the Board's findings, "[t]he disparity cannot be attributed to chance. . . . [T]he Board finds that the results can only be attributed to discriminatory procurement practices. . . . " *Id.* The Board also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices."

The City's findings appear supported by the record. A study commissioned by the City and prepared by BPA Economics, Inc., indicates the existence of large disparities between the award of city contracts to available

non-minority businesses and to MBEs. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City of San Francisco-based MBEs for the 1987-88 fiscal year. It found that available MBEs received far fewer city contracts in proportion to their numbers than their availabie non-minority counterparts. Specifically, the study found that with respect to prime construction contractiing, the disparities between the number of available Asian, Black, and Hispanic owned locally based firms and the number of contracts awarded to such firms was statistically significant and supported an inference of discrimination. For example, in prime contracting for construction, although MBE availability was 49.5%, MBE dollar participation was only 11.1%; in prime contracting for equipment and supplies, although MBE availability was 36%, MBE dollar participation was only 17%; and in prime contracting for general services, MBE availability was 49% although MBE dollar participation was only 6.2%. In our recent decision, *Coral Const.*, we emphasized that such statistical disparities are "an invaluable tool" in demonstrating the discrimination necessary to establish a compelling interest. *Coral Const.*, 941 F.2d at 918; *see also Croson*, 488 U.S. at 509 (plurality) ("[W]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.").

Moreover, the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to like." *Coral Const.*, 941 F.2d at 919 (*quoting Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1976)). These accounts include numerous reports of MBEs being denied contracts despite being the low bidder. MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties. MBEs being refused work even after they were awarded the contracts as low bidder, and MBEs being harassed by City personnel to discourage them from bidding on city contracts. On appeal, the City points to numerous individual accounts of discrimination to substantiate its findings that discrimination exists in the City's procurement processes, that an "old boy network" still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. Such a "combination of convincing anecdotal and statistical evidence is potent." *Coral Const.*, 941 F.2d at 919; *see also Croson*, 488 U.S. at 509, ("[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.").

AGCC challenges specific pieces of evidence proffered by San Francisco to justify the 1989 Ordinance. It argues first that the results of the BPA study, which the Board relied on heavily to support its findings of discrimination, were skewed to underrepresent the amount of contract dollars awarded to minorities. As support, AGCC points to statistics presented in the City's Budget Analysis of March 17, 1989, that indicate that MBEs received 36.7% of prime contract dollars awarded in fiscal

year 1987-88, a far higher percentage than reflected in the BPA study. Data used in the City's Budget Analysis were also used to calculate the BPA statistics. The City argues that the disparity in the results of the two studies stems from refinements made to the relevant data in the BPA study in order to tailor the data more closely to the 1989 Ordinance's scope. For example, the City contends that BPA limited the data to contracts awarded to MBEs in the City and County area and verified particular data used in the City's Budget Analysis before including it in the BPA study. AGCC responds that refinements made to the data in the BPA study are improper, but it specifically faults only one refinement: the alleged exclusion of all Public Works construction contracts of less than $250,000 from the data. AGCC argues this exclusion would result in undercounting MBEs, which would presumably be newer, smaller, and more apt to bid for smaller contracts. The City, however, points to evidence within the record indicating that BPA in fact included the lower-priced contracts within the BPA data. Because AGCC raises no other specific contention regarding the inaccuracy of the BPA study, and because of evidence in the record contradicting BPA's assertion regarding the inclusion of lower-priced contracts, we conclude that the district court's finding that the BPA statistics were reliable was not clearly erroneous.

AGCC also argues that the statistics relied upon by the City to demonstrate discrimination in its contracting processes fail to meet the standards we established in AGCC I because they consider only MBEs located within San Francisco. Again, AGCC fails to demonstrate a substantial likelihood of success on the merits of this issue.

In AGCC I, we faulted the City for failing to determine whether its past actions had visited racial discrimination on MBEs outside of its borders because the scheme adopted by the 1984 Ordinance allowed non-resident MBEs to obtain benefits. 813 F.2d at 933-34. In contrast to the 1984 Ordinance, the 1989 Ordinance applies only to resident MBEs. The City therefore appears appropriately to have confined its study to the city limits in order to focus on those whom the preference scheme targeted.

Furthermore, AGCC contends that the City's findings of discrimination fail to rise to the level of specificity demanded by both AGCC I and *Croson*. However, the City's findings are substantially more specific than those found inadequate in these prior cases. In addition, they are clearly based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as significant statistical disparities in the award of contracts. As pointed out by the City, it must simply demonstrate the existence of past discrimination with specificity; there is no requirement that the legislative findings specifically detail each and every instance that the legislative body has relied upon in support of its decision that affirmative action is necessary. *Cf. Croson*, 488 U.S. at 501 ("[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.") (quoting *Hazelwood Sch. Dist.*, 433 U.S. at 307-08; *Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring) (the public employer need not "convinc[e] the court of its liability for prior unlawful discrimination" but rather simply must demonstrate "a firm basis for concluding"

that affirmative action is warranted). Unlike the exceedingly sparse foundation for the City of Richmond's findings of discrimination, the record in this case indicates that San Francisco is likely to demonstrate a "strong basis in evidence" supporting its decision to adopt a race-conscious plan.[11]

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[11] AGCC also contends that the 1989 Ordinance must be struck down because it fails to identify specific bid practices that caused the racial imbalance as required by the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). In doing so, AGCC seeks to have us engraft the framework for title VII set out in *Atonio* onto *Croson's* equal protection framework. This proposition has never been sanctioned either explicitly or implicitly in the equal protection context by the Supreme Court or this court. To do so would appear to violate the Supreme Court's statement in *Croson* that statistical disparities alone would be sufficient to support a showing of discrimination sufficient to institute a race-conscious remedial plan. *Croson* 488 U.S. at 509. Furthermore, it would undercut *Croson's* recognition that a governmental actor may "use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment." *Id.* at 492. Finally, by imposing the same burden imposed on a plaintiff in a private sector employment discrimination suit, it would fail to take into account the special burden imposed on states and municipalities to enact programs to eliminate discrimination. As we stated in *AGCC I*, "a state or its political subdivision has the authority—indeed the 'constitutional *duty*,' *Wygant*, 106 S.Ct. at 1856 (O'Connor, J. concurring) (emphasis original)—to ascertain whether it is denying its citizens equal protection of the laws and, if so, to take corrective steps." *AGCC I*, 813 F.2d at 929; *see also Coral Const.*, 941 F.2d at 920 ("The remedy for intentional discrimination often calls for race-specific relief.").

B. *Narrowly Tailored*

To survive strict scrutiny, not only must a race-conscious remedy serve a compelling state interest, it must be narrowly tailored to redress the consequences of discrimination. *Croson*, 488 U.S. at 507-08. In *Coral Construction*, we isolated three characteristics identified by the *Croson* court as indicative of narrow tailoring. First, "an MBE program should be instituted either after, or in conjunction with, race neutral means of increasing minority business participation in public contracting." Slip op. at 10701. Second, the plan should avoid the use "of rigid numerical quotas." *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Croson*, 488 U.S. at 507-08. Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals and guard against the unfair exploitation of these plans, two circumstances we cautioned against in *AGCC I*. 813 F.2d at 936. Third, "an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction." *Coral Const.*, 941 F.2d at 922.

AGCC argues that the Ordinance does not possess the first indicium of narrow tailoring; according to AGCC the City improperly failed to adopt race-neutral means to accomplish its objectives. The record indicates, however, that the City considered, but rejected as not viable, specific race-neutral alternatives including creating a fund to assist newly established MBEs in meeting bonding requirements. As we stated in *Coral Const.*, "while strict scrutiny requires serious, good faith consideration of

race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. . . . however irrational, costly, unreasonable, and unlikely to succeed such alternative may be." 941 F.2d at 923. Moreover, the record demonstrates that the City has attempted to use race-neutral means to address the problem of discrimination. It is undisputed that the City more than ten years ago attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force. The record further indicates that the City made and continues to make efforts to enforce the anti-discrimination ordinance. "Inclusion of such race-neutral measures in one factor suggesting that an MBE plan is narrowly tailored." *Id.* at 10704.

The 1989 Ordinance at issue in this case also appears to possess the requisite flexibility necessary to withstand a motion for preliminary injunction. Rather than the rigid quota system found faulty in *Croson*, the City has adopted a more modest system, that of bid preferences. As we noted in AGCC I, the advantages provided by such preferences "are relatively slight[;] . . . there are no goals, quotas, or set-asides." 813 F.2d at 943; *see also Coral Const.*, 941 F.2d at 924 ("The percentage preference method . . . is simply not a quota."). Moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work

would suggest.[12] For example, Black-owned medical services firms do not receive preferences because they have not been disadvantaged in the past with respect to the award of these contracts. For the same reasons, San

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[12] We find AGCC unlikely to prevail on its argument that tailoring the remedy to specific minority groups is insufficient to meet constitutional requirements, and that to pass constitutional muster any remedy adopted must provide redress only to specific individuals who have been identified as victims of discrimination. To reach any other decision would thwart the Supreme Court's directive in *Croson* that race conscious remedies may be permitted in some circumstances. As pointed out by the district court, "an iron clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race conscious remedy superfluous." Opinion at 31; *see also Wygant v. Jackson Bd. of Educ,* 476 U.S. at 287 (an affirmative action plan "need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored.' ") (O'Connor J., concurring).

We also find AGCC unlikely to prevail on its contention that the remedy encompassed within the 1989 Ordinance is not sufficiently tailored to the discrimination found by the Board because it does not individually remedy each type of discrimination suffered. For example, AGCC argues that the bid preference is not narrowly tailored to remedy injuries suffered by those who have been the low bidder on contracts but were still not awarded contracts by City officials. Race-conscious plans, by their nature, are not tailored to remedy individual injuries suffered by individual victims. Here, the City has found that continued discrimination places MBEs at a competitive disadvantage and seeks to counteract this situation by providing MBEs with a counterbalancing advantage. We find this nexus between violation and remedy to be close enough to warrant affirmance of the district court's denial of the motion for preliminary injunction.

Francisco's program does not provide for a bid preference for Asian- or Latino-owned architectural/engineering or computer system firms. In addition, since the Ordinance confines the preference to those who are economically disadvantaged, MBEs are prevented from using the preferences to obtain windfalls.

In addition, the burdens of the bid preferences on those not entitled to them appear relatively light and well distributed. During the first six months the 1989 Ordinance was in effect, 92.7% of all construction prime contracting dollars awarded to San Francisco firms went to non-MBEs. In addition, in contrast to remedial measures struck down in other cases, those bidding have no settled expectation of receiving a contract. *See Metro Broadcasting Inc. v. Fed. Communications Comm'n.* 110 S. Ct. 2997, 3026 (1990) (racial preference plan for obtaining FCC licenses contravenes " 'no legitimate firmly rooted expectation[s]' of competing applicants", thus rendering the burden on nonminorities "slight") (quoting *Johnson v. Transp Agency, Santa Clara County,* 480 U.S. 616, 638 (1987)); *cf. Wygant,* 476 U.S. at 281-82 n.8 (finding undue burden imposed by school board program on plaintiffs fired from job because of race) (plurality opinion). In addition, under the Ordinance, non-MBE firms can take advantage of the preference through joint ventures with MBEs. Finally, the 1989 Ordinance allows businesses to file complaints requesting waivers in particular circumstances, including where MBEs or WBEs are unavailable. 1989 Ordinance at Ch. 12D.13. The nine-month report from the City and County of San Francisco indicates that the City has waived preferences for approximately 44% of contracting dollars awarded under the 1989 Ordinance.

That the 1989 Ordinance is "limited in its geographical scope to the boundaries of the enacting jurisdiction," *Coral Const.*, 941 F.2d at 925, also increases its likelihood of being sustained on the merits. Unlike the 1984 Ordinance, and the program considered in *Coral Const.*, San Francisco has carefully limited the 1989 ordinance to benefit only those MBEs located within the City's borders. The Ordinance therefore redresses only the effects of discrimination within the City's own legislative jurisdiction. Based on the likelihood that, in ruling on the merits, the district court could find all three circumstances associated with narrow tailoring present, we do not find the district court abused its discretion in determining AGCC would not likely succeed with respect to this claim.

CONCLUSION

The district court did not abuse its discretion in denying AGCC's request for a preliminary injunction enjoining enforcement of the bid preference ordinance pending decision on the merits. On its charter claims, AGCC at most raises serious questions, but fails to demonstrate that the balance of hardships tips sharply in its favor. On its constitutional claims, AGCC fails to demonstrate a sufficient likelihood of success on the merits.

AFFIRMED.

O'SCANNLAIN, Circuit Judge, specially concurring:

While I agree with my colleagues that the district court properly denied AGCC's request for preliminary

injunctive relief, I cannot concur in their analytical approach.

I

I am unable to accept the assertion that AGCC has not demonstrated probable success on the charter amendment issue. As the opinion acknowledges, *ante* at 20, California law is clear. A vote of the people, as provided in the California Constitution, is the sole and exclusive means of amending a city charger. *Uhl v. Collins*, 17 P.2d 99 (Cal. 1932). The California courts jealously guard the people's right of initiative as enumerated in the constitution; the California Supreme Court has stated that it is *"required to resolve any reasonable doubts in favor of the exercise of this precious right."* *Brosnahan v. Brown*, 651 P.2d 274, 276 (Cal. 1982). *See also Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1302 (Cal. 1978).

The majority can point to no instance in which the constitutional requirement has not been rigidly applied. Policy arguments against its imposition in this circumstance, *see ante* at 15383, cannot overcome the "clear dictate of California law," *ante* at 15383. I am persuaded that AGCC has demonstrated a substantial likelihood of success on this issue.

Accordingly, I must go on to reach the question of whether AGCC has shown a possibility of irreparable harm justifying the issuance of a preliminary injunction. I conclude that it has not. AGCC's members will be harmed by the allegedly invalid charter amendment only if they are denied contracts valued at over $50,000 but

less than $10,000,000 due to the bid preferences for MBEs and WBEs. The sole evidence of injury to AGCC members in the record is the declaration of Paul Hodgson. Although Mr. Hodgson declares that his firm has been discouraged from bidding on city contacts by the 1989 Ordinance, he does not mention the size of the contracts his firm would otherwise have sought. Thus, there is no evidence in the record that any AGCC member has lost a bid due to the charter amendment, or has even been discouraged from bidding by that amendment. I must therefore conclude that AGCC has not met its burden of *"demonstrat[ing]* immediate threatened injury" rather than simply alleging speculative harm.[1] *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). *See also Big Country Foods, Inc. v. Board of Educ.*, 868 F.2d 1085, 1088 (9th Cir. 1989) (upholding denial of preliminary injunction where record "barren of evidence of lost profits").

II

Although I agree with the majority that AGCC has not shown a likelihood of success on the merits of its equal protection claim, I write separately to emphasize the limited nature of appellate review of the grant or denial of a preliminary injunction. Detailed consideration

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[1] Because I find that AGCC has not shown a sufficient possibility of *any* injury due to the charter amendment, I need not determine if allegations of loss of profits due not to the city's refusal to award the contract to a low bidder but rather to failure to bid at all would justify preliminary injunctive relief.

of the merits of AGCC's constitutional claim is neither necessary nor appropriate in this context. The issue is not the constitutionality of the 1989 Ordinance, but simply whether AGCC has shown a sufficient probability of success on the merits to justify preliminary relief.

Although I do not necessarily disagree with it, the detailed discussion of the statistical evidence presented to the district court, *see ante* at 30-32, as well as much of the discussion of whether the 1989 Ordinance meets the requirements of *Croson*, is inappropriate. Because the Ordinance reasonably appears to comply with *Croson*, the district court did not abuse its discretion in refusing to grant a preliminary injunction. This court need not say more. Our decision on this narrow issue today should not be regarded as determinative of the ultimate resolution of the dispute. *See Big Country Foods*, 868 F.2d at 1087.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 90-16582
CT/AG#: CV-89-4454-TEH

- ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,, a nonprofit California corporation;

Plaintiff-Appellant

v.

COALITION FOR ECONOMIC EQUITY, SAN FRANCISCO HISPANIC CHAMBER OF COMMERCE, ASIAN, ICN., SAN FRANCISCO BLACK CHAMBER OF COMMERCE,

Intervenor-Appellee

and

CITY AND COUNTY OF SAN FRANCISCO

Defendant-Appellee

(Filed Jan. 14, 1992)

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 12/6/91.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

JAN 6 1992

by Donna M. Gilmore
Deputy Clerk

APPENDIX B

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, Defendant,

Coalition for Economic Equity, San Francisco Hispanic Chamber of Commerce, Asian, Inc., San Francisco Black Chamber of Commerce, Defendants-intervenors.

No. C89-4554 TEH.

United States District Court,
N.D. California.

Oct. 9, 1990.

General contractors' association brought action against city and county to challenge bid preference for minority-owned businesses and city charter provision requiring acceptance of lowest reliable and responsible bid only if contracts involved more than $10 million. Association moved for preliminary injunction. The District Court, Thelton E. Henderson, J., held that: (1) association would not be entitled to preliminary injunction against city charter, since alleged injury was purely pecuniary, and (2) association failed to show likelihood of success on claims that bid preference failed to serve compelling interest of remedying effects of past discrimination and was not narrowly tailored to that goal.

Motion denied.

Ronald A. Zumbrun, John H. Findley, Sharon L. Browne, Pacific Legal Foundation, Sacramento, Cal.,

James W. Polk, Associated Gen. Contractors of CA, Inc., West Sacramento, Cal., for plaintiff.

Eva Jefferson Patterson, San Francisco Lawyers, Committee for Urban Affairs, San Francisco, Cal., Robert L. Harris, Charles Houston Bar Assoc., Oakland, Cal., Judith E. Kurtz, Shayna I. Marshall, Equal Rights Advocates, San Francisco, Cal., William C. McNeill, III, Employment Law Center, San Francisco, Cal., for defendants.

MEMORANDUM AND ORDER DENYING PRELIMINARY INJUNCTION

THELTON E. HENDERSON, District Judge.

This matter comes before the Court on plaintiff's motion for a preliminary injunction. Having given careful consideration to the parties' written and oral presentations, and having reviewed the extensive administrative record, the Court concludes that plaintiff has not satisfied the standard for imposing interim injunctive relief. The discussion below constitutes the Court's findings of fact and conclusions of law, as required by Fed.R.Civ.P. 52(a).

I.

BACKGROUND

Once again, this Court is called upon to judge the constitutionality of San Francisco's efforts to improve the opportunities for minority entrepreneurs to participate in city contracting. This continuing endeavor began over ten years ago with the passage of legislation prohibiting city contractors from discriminating against their employees

on the basis of, among other things, race or color, and requiring them to take steps to integrate their work force. SF Admin. Code Ch. 12B. The Human Rights Commission of San Francisco ("HRC") subsequently concluded that further steps were necessary and adopted regulations requiring city prime contractors to award a portion of their subcontracts to minority business enterprises. SF Admin. Code, Ch. 12B(9). Then in 1982, the San Francisco Board of Supervisors--responding to complaints that minority and women owned businesses were still finding it difficult to break into the ranks of the city's prime contractors—directed the HRC to conduct hearings into the matter, make findings, and propose remedial legislation, if warranted. This process ultimately led to adoption of the Minority/Women/Local Business Utilization Ordinance, 139-84 ("1984 Ordinance") in April of 1984. SF Admin. Code, Ch. 12(D).

This five year legislation required the city to set aside ten percent of its contracting dollars for minority-owned business enterprises ("MBEs") and two percent for women-owned business enterprises ("WBEs"). It also provided MBEs, WBEs and locally owned businesses ("LBEs") a five percent bidding preference to be taken into account when the city purchaser calculated the low bid. *Id.* at Ch. 12(D).8(B). To further encourage use of MBEs and WBEs, the legislation set an overall "goal" that 30 percent of city contract dollars would be earned by MBEs and ten percent by WBEs. *Id.* at Ch. 12D.3.

The 1984 Ordinance quickly drew a constitutional attack from the Associated General Contractors of California ("AGCC"), an organization whose members are primarily white, male contractors engaged in the building

and construction industry.[1] The challenge was vindicated in part by the Ninth Circuit Court of Appeals, which found the remedies favoring women and locally owned businesses constitutionally sound but invalidated the race based provisions as offending the equal protection guarantees of the fourteenth amendment. *AGCC v. City and County of San Francisco*, 813 F.2d 922, 928-944 (9th Cir. 1987) (hereafter "*AGCC-I*"). The Court also ruled that all three preferences violated San Francisco City Charter section 7.200, which required that contracts over $50,000 be let to the "lowest reliable and responsible bidder." *Id.* at 927-928. This restriction, the Court found, compelled the city to award contracts based solely on the lowest bid, and without consideration of any other factors. *Id.* at 925-26. The city filed a petition for rehearing and suggestion for rehearing en banc, which stayed the Ninth Circuit's mandate. However, before any action was taken on the petition, the legislation expired in June of 1989, and the appeal was subsequently dismissed as moot.

Meanwhile, in January of 1989, a divided United States Supreme Court[2] struck down a similar ordinance

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[1] *See* complaint at ¶ 3 ("A substantial number of AGCC's members desire to bid on public construction contracts to be let by defendant, but because they are not members of the race, sex, and local residence classes granted preference by defendant's policies and ordinance here in issue, said members are prevented . . . from having their bids . . . considered on the same basis . . . .").

[2] Justice O'Connor announced the judgment of the Court; however, a majority of the justices joined only in parts I, III-B, and IV of her opinion. Chief Justice Rehnquist and Justice White joined in the entire opinion; Justice Stevens joined parts

(Continued on following page)

that had been adopted by the city of Richmond, Virginia. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). However, in so doing, the Court confirmed that municipalities are empowered to employ race conscious remedies in the area of public contracting, if the remedy chosen is narrowly tailored to serve a compelling state interest. The *Croson* decision prompted the city of San Francisco to conduct additional hearings and commission statistical studies to determine whether a race conscious remedy would, in fact, serve a compelling state interest, as *Croson* required.[3] Concluding that it would, based on evidence of discrimination against MBEs by the city and private contractors, the city fashioned a remedy that it believed to be sufficiently

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I, III-B and IV; Justice Kennedy joined in all but part II, and Justice Scalia concurred in the judgment. Justices Blackmun, Brennan, and Marshall dissented.

[3] Prior to the issuance of *Croson*, the Human Rights Commission, in June and July of 1988, heard testimony from 42 witnesses and received written submittals from 127 minority, women, local, and other business representatives. It also received testimonial and statistical evidence presented by city departments and HRC staff. Subsequent to *Croson*, ten additional public hearings were conducted, and additional written testimony was received. The San Francisco Board of Supervisors also requested that the city's Budget Analyst study the participation of minority and women owned businesses in city contracts at the prime contractor level for the fiscal year 1987-88, and compare that participation to minority and women businesses' share of their relevant respective industries or professions. The HRC also commissioned BPA Economics, Inc. to perform a statistical analysis of the data provided by city departments and the Budget Analyst. SF Admin. Code, Ch. 12D.2.

"narrowly tailored" to pass constitutional muster. The result was the Minority/Women/Local Business Utilization Ordinance--II, No. 175-89, unanimously passed by the Board of Supervisors on May 22, 1989,[4] and signed into law one week later by the Mayor. SF Admin. Code, Ch. 12D (hereafter the "1989 Ordinance").

Substantially reduced in scope from its predecessor, and based on a stronger factual predicate, the 1989 Ordinance does not set aside *any* amount of city contract dollars for minority or women owned enterprises.[5] Rather, its remedial focus is "bid preferences" for prime contractors; preferences which, the city asserts, are designed to provide M/W/LBEs with a "competitive plus" to compensate for past discriminatory practices. Specifically, it provides a five percent bid preference for LBEs and a ten percent bid preference for local MBEs and WBEs--the latter representing a 5 percent locality preference plus a 5 percent preference based on MBE or WBE status. SF Admin. Code Ch. 12D.8(B)(2).[6] The 1989

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[4] Two of the eleven members of the Board of Supervisors were absent at the final vote on May 22, 1990; however, they had previously voted in favor of the legislation at its "second reading" the week before.

[5] City departments are instructed to make "good faith efforts" to reach certain participation goals, but no specific result need be attained. SF Admin Code, Ch. 12D.8(A)(1).

[6] The Director of the San Francisco Human Rights Commission must certify businesses as bona fide M/W/LBEs through appropriately promulgated procedures. SF Admin. Code Ch. 12D.6(B)(1).

Ordinance also allows persons to benefit from preferences who would not otherwise qualify by joint venturing with an M/WBE. Thus, an non M/WBE that joint ventures with a local M/WBE, whose participation is between 35 and 51 percent, benefits from a five percent bid preference. Where the local M/WBE's participation is 51 percent or more, the preference increases to ten percent. *Id.*

In November 1989, the San Francisco Board of Supervisors also amended (per Ordinance No. 424-89) section 7.200 of the city charter. The amendment increased the dollar threshold for applying the "lowest reliable and responsible bidder" requirement from $50,000 to 10 million dollars. As a result, the city's charter only requires acceptance of the lowest bid in contracts involving more than 10 million dollars.[7] *See* Plaintiff's Memorandum in Support of TRO, Exh. 1. Absent this amendment, even a new MBE ordinance that could withstand constitutional scrutiny under *Croson* would have little practical impact, for it would apply only to contracts under $50,000, in light of the Ninth Circuit's decision in *AGCC-I*.

On December 18, 1989, the Associated General Contractors of California filed the instant action which is a facial constitutional challenge to the MBE provisions of the 1989 Ordinance, insofar as they pertain to public

[7] In November of 1988, the electorate had amended section 7.200 to authorize the Board of Supervisors to increase or decrease by ordinance the threshold figure.

works construction contracts.[8] The action also contends that the legislation raising the $50,000 threshold to ten million, with respect to the city Charter bidding provision, is invalid under state law. By this motion, brought pursuant to Fed.R.Civ.P. 65, plaintiff seeks to preliminarily enjoin San Francisco from enforcing the bidding preferences to the extent plaintiff contends they are unconstitutional or invalid under state law.

"District courts have broad discretion to grant or deny preliminary injunctive relief." *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 724 (9th Cir. 1986); 11 Wright and Miller, Federal Practice and Procedure, § 2948 at 427. However, to guide this discretion, the Ninth Circuit has devised a test which requires the balancing of the merits of the cases against competing equitable considerations. Thus, the moving party must demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. These formulations "are not different tests but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases." *Big Country Foods, Inc. v. Bd. of Educ. of the Anchorage School Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989). However, under either

[8] The action does not attack the constitutionality of race conscious provisions of the ordinance that relate to purchase or service contracts. Nor does the complaint challenge the constitutionality of the preferences favoring WBEs and LBEs.

formulation, the moving party "must demonstrate a significant threat of irreparable injury, irrespective of the magnitude of the injury." *Id.*

II.

EQUITABLE CONSIDERATIONS

Should members of AGCC fail to win a city contract due to the allegedly invalid preferences, plaintiff does not seriously dispute that any lost profits could not be remedied by a money judgment. In addition, at argument, plaintiff conceded that no AGCC member was currently asserting denial of a contract due to the MBE provisions.[9] Plaintiff also asserts that members are deterred from bidding because of the five percent MBE bidding preference. However, only one member of plaintiff has come forward with such a complaint. *See* Hodgson Decl.

Given the above, plaintiff's *pecuniary* interest can be adequately protected by available legal remedies, and thus does not warrant a mandatory injunction pending trial. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506-07, 79 S.Ct. 948, 954, 3 L.Ed.2d 988 (1959) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies");

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[9] The city's statistics indicate that for the first six months the 1989 Ordinance was in effect, 92.7 percent of the city's prime construction contract dollars awarded to San Francisco firms went to non-MBEs, while only 7.3 percent went to certified *and* non-certified MBEs. Thus, it is apparent that AGCC members are competing for and winning the vast majority of construction contracts. Rosales Decl. at ¶ 2 and Exh. G.

State of California v. Tahoe Regional Planning Agency, 766 F.2d 1316, 1319 (9th Cir. 1985) (financial injury does not constitute irreparable harm where legal relief is available); *Bangor Baptist Church v. State of Maine*, 576 F.Supp. 1299, 1324 (D.Me.1983); 11 Wright & Miller, *supra*, § 2944 at 392. Nor can we say, given the 1989 Ordinance's limited impact on plaintiff's members, the city's strong interest in remedying its discriminatory practices, and the interests of affected MBEs, that the balance of hardships "tips sharply" in plaintiff's favor. *Big Country*, 868 F.2d at 1088.

That constitutional rights are at issue, however, raises the specter of irreparable injury. "Constitutional rights are so basic to our society that their deprivation must be redressable by equitable remedies. Injury from their deprivation is almost by definition irreparable." *Gour v. Morse*, 652 F.Supp. 1166, 1173 (D.Vt. 1987). Thus, while plaintiff's financial interest does not establish a "significant threat" of irreparable injury, justifying equitable intervention, its constitutional claim does, to the extent it is meritorious. Accordingly, satisfying the equitable prong of the preliminary injunction test turns, in this particular case, on the viability of plaintiff's constitutional claim.[10] It is to that claim that we now turn.

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[10] Although courts have stated that "when an alleged deprivation of a constitutional right is involved . . . no further showing of irreparable injury is necessary," *see e.g., Sharif by Salahuddin v. New York State Educ. Dep't*, 709 F.Supp. 345, 359-60 (S.D.N.Y. 1989) preliminary injunctive relief is generally only granted where the plaintiff has also demonstrated a likelihood of success on the merits. *See e.g., Sharif*, 709 F.Supp. at 364

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III.

THE EQUAL PROTECTION CLAIM

Our constitution's guarantee of equal protection on the one hand, and our government's interest in redressing a history of pervasive racial discrimination on the other, have proven uneasy partners in this country's quest to eradicate the destructive effects of racial prejudice that have long stained our nation. For as governmental bodies at all levels have concluded,[11] deepseated

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(plaintiffs demonstrated likelihood of success on merits); *Doe v. Mundy*, 514 F.2d 1179, 1183 (7th Cir. 1975) (plaintiffs showed probable success on merits); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F.Supp. 1560, 1564 (C.D.Cal 1987) (court finds plaintiff "will prevail on the merits" of fourth amendment claim); *Moynihan v. Hickey*, 627 F.Supp. 466, 475 (D.N.H. 1986) (likelihood of success on merits shown); *Greater Baltimore Bd. of Realtors v. Hughes*, 596 F.Supp. 906, 924 (D.Md 1984) ("In light of its finding that the plaintiffs have demonstrated likelihood of success on the merits of their first amendment arguments . . . [they] have met the irreparable injury prong"). Indeed, it is only upon a showing of a likelihood of success on the constitutional claim that the "significant threat" of irreparable injury arises.

Conversely, even assuming *arguendo* that plaintiff could demonstrate a probability of success on the merits of the (non constitutional) state law claims, injunctive relief would not be warranted given that the only resulting injury from those claims is purely pecuniary and compensable at law. Accordingly, the Court does not address the state law claims at this juncture.

[11] *See e.g., Fullilove, infra,* (federally sponsored MBE program); *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir.

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discriminatory patterns are seldom reversed by mere mandates "not to discriminate." Rather, certain circumstances may require the force of a race conscious remedy to dislodge ingrained patterns and bring the promise of complete equality within the grasp of, if not this, at least future generations.

Acknowledging that redressing past discrimination may necessitate taking "race into account," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280, 106 S.Ct. 1842, 1850, 90 L.Ed.2d 260 (1986),[12] the Supreme Court has concluded more than once that the constitutional right to equal protection and race conscious remedies can coexist under

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1983) (state sponsored MBE program); *South Florida Chapter, Associated General Contractors of America, Inc. v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir. 1984), *cert. denied*, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984); *Coral Constr. Co. v. King County*, 729 F.Supp. 734, 735 (W.D.Wash. 1989) (appeal pending) (county sponsored MBE programs), *Contractors Ass'n v. City of Philadelphia*, 735 F.Supp. 1274 (E.D.PA.1990) (city sponsored MBE program); *see also, Scholars' Reply to Professor Fried*, 99 Yale Law Journal 163, 166 (1989) ("Affirmative action programs have been approved, time and again, by the American people acting through the democratic branches of government—and at the national, state, and local level").

[12] *See also, Regents of the University of California v. Bakke*, 438 U.S. 265, 407, 98 S.Ct. 2733, 2807, 57 L.Ed.2d 750 ("I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take into account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy") (Blackmun, J., separate opinion).

appropriate, if limited, circumstances. *See, Metro Broadcasting, Inc. v. Federal Communications Comm'n*, ___ U.S. ___, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (upholding racial preference with respect to FCC licensing and distress sale policies); *Croson*, 488 U.S. at 509, 109 S.Ct. at 729 (invalidating racial quota for subcontractors but leaving room for race conscious remedies where circumstances warrant); *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (allowing considerations of race in admissions decisions); *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (upholding minority set aside for federal contracts); *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (finding that race based promotional quota survives strict scrutiny); *see also, Cone Corp. v. Hillsborough County*, 908 F.2d 908, 913 (11th Cir. 1990) (Under *Croson*, municipalities may enact race conscious legislation in some circumstances); Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 Yale L.J. 1711, 1712 (1989).

With respect to local governments, however, those circumstances are narrowly prescribed. Lacking the full powers bestowed on Congress under section 5 of the fourteenth amendment, municipalities may utilize racial classifications only to serve a compelling state interest, and then the method chosen must be narrowly tailored to serve that interest. *Croson*, 488 U.S. at 490-91, 493-94, 109 S.Ct. at 719, 721-22; *Wygant*, 476 U.S. at 273-74, 106 S.Ct. at 1846-47. This searching level of judicial inquiry is necessary to ensure that a tool as highly suspect as a racial classification is actually being used for legitimate

purposes and not for "illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493, 109 S.Ct. at 721. This test also "ensures that the means chosen 'fit' [the state's] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.*

While the level of scrutiny demanded is clearly exacting, it is not beyond satisfaction. "Nothing we say today," the Court explained, "precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction . . . . In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Croson*, 488 U.S. at 509, 109 S.Ct. at 729; *see also id.* at 505, 109 S.Ct. at 727 (*absent* evidence of "identified discrimination" the city of Richmond could not "demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race") (emph. added).[13]

Plaintiff contends that the 1989 ordinance, properly scrutinized, does not serve a compelling state interest, and even if it does, it is not narrowly tailored. The city, on the other hand, asserts that the testimonial and documentary evidence amply demonstrates that the purpose of the 1989 ordinance was, in fact, to redress past discrimination

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[13] *See also id.* 488 U.S. at 497, 109 S.Ct. at 723 (Noting that in *Wygant*, "Justice Powell, writing for the plurality, again drew the distinction between 'societal discrimination' which is an inadequate basis for race-conscious classifications, and the **type of identified discrimination that can support and define the scope of race-based relief"**) (emph. added).

against MBEs, and that the five percent MBE bid performance is a modest remedy, narrowly tailored to achieve that goal.

A. Compelling interest

While general societal discrimination, "without more, is too amorphous a basis for imposing a racially classified remedy," *Wygant*, 476 U.S. 267, 276, 106 S.Ct. at 1848, remedying the effects of discriminatory practices is a compelling governmental interest. *Croson*, 488 U.S. at 492, 109 S.Ct. at 720; *Paradise*, 480 U.S. at 167, 107 S.Ct. at 1065 ("The government unquestionably has a compelling interest in remedying past and present discrimination by a state actor"); *Coral Constr. Co. v. King County*, 729 F.Supp. at 735.

However, local governments can not insulate race conscious remedies from attack simply by claiming a remedial motive. Because "[r]acial classifications are subject . . . simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500, 109 S.Ct. at 724. Rather, the city must convince the court that its proffered purpose is genuine, a burden which can be met by supplying evidence of "identified discrimination" within the city's jurisdiction warranting remedial action. *Id.*, 488 U.S. at 505, 109 S.Ct. at 727; *cf.*, *Wygant*, 476 U.S. at 277, 106 S.Ct. at 1848 (before school board embarks on an affirmative-action program, it must have "convincing evidence" that remedial action is warranted)

This is not a requirement, however, that a local public employer "convinc[e] the court of its liability for prior unlawful discrimination; nor does it mean that the court

must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld," *Wygant*, 476 U.S. at 292, 106 S.Ct. at 1856 (O'Connor, J., concurring); *Chicago Fire Fighters v. Washington*, 736 F.Supp. 923, 926 (N.D.Ill. 1990). Rather, the critical point is that the "public actor has a firm basis for believing that affirmative action is warranted." *Wygant*, 476 U.S. at 292, 106 S.Ct. at 1856 (O'Connor, J., concurring); *Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583, 590-594 (6th Cir.1987), *aff'd summarily*, 489 U.S. 1061, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989) (reliance on societal discrimination failed to provide "firm basis" for state's remedial plan). Or as Justice O'Connor most recently stated in the context of public contracting, cities must have a " 'strong basis in evidence,' for [their] conclusion that remedial action [is] necessary." *Croson*, 488 U.S. at 500, 109 S.Ct. at 724.

Croson declines to detail exactly what kind of evidentiary showing will suffice, focusing instead on the inadequacy of the record underpinning the Richmond city program. However, we conclude that the evidentiary basis for the 1989 Ordinance is "strong" and in stark contrast to the record relied on by the city of Richmond.

Richmond had primarily relied on (1) the ordinance's declaration that it was remedial, (2) statements by proponents concerning discrimination in the construction industry in general, (3) statistical disparities between the number of minority businesses receiving prime contracts and the number of minorities in the general city

population,[14] and (4) the dearth of minority contractors in local and state contractors associations. *Croson* 488 U.S. at 499, 109 S.Ct. at 723-24.

Here, San Francisco has done far more than declare a benevolent purpose and point to generalized discrimination in the construction industry and statistics with little probative value. Rather, it has "identified discrimination" against MBEs in San Francisco by both the city and private contractors. Particularly significant is the statistical analysis prepared by BPA, Economics, Inc. Using the city and county of San Francisco as the "relevant market,"[15] the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the city to San Francisco based MBEs for the 1987-1988 fiscal year. *See*

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[14] In *AGCC-I*, San Francisco was also criticized for relying on an over inclusive statistical comparison--between the amount of prime contracts awarded MBEs in 1982-82 (2.8 percent) and the percentage of minority businesses in the city as a whole (33 percent). This latter figure lacked probative value, the court held, because it included various types of business that did not normally provide goods or services that were "subject to significant contracting by the city." 813 F.2d at 933.

[15] Plaintiff's criticism that the city improperly designated the "relevant market" is misplaced. First, the 1989 ordinance is directed at remedying past discrimination against *San Francisco based* MBEs (only local MBEs qualify for a bid preference). Accordingly, any statistical analysis must correspond to this specific group. *Croson*, 488 U.S. at 501, 504, 109 S.Ct. at 725, 727); *Coral Constr. Co.*, 729 F.Supp. at 737 (noting that, in contrast to the *Croson* case, "nearly all of King County's evidence applies specifically to the construction industry within the county's jurisdiction"). Notably, plaintiff offers no alternative "more relevant" market.

"Statistical Support for San Francisco's MBE/WBE/LBE Ordinance," Legislative File 284-88-2 M, at 1-2.[16]

The study found that with respect to prime construction contracting, the disparities between the number of available Asian, Black, and Hispanic owned locally based firms and the number of contracts awarded to such firms was statistically significant, not attributable to chance, and supported an inference of discrimination. *Id.* at 18-20. Specifically, the study found that Asian construction contractors had a 23.6 percent availability, but received only 4.3 percent of prime construction contract dollars. The

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[16] The statistical report explains the approach used as follows: "[In *Croson*, the] Court emphasized a particular type of statistical evidence, namely a ratio calculated as the percentage of contract dollars going to minority businesses divided by the percentage of available businesses which are minority. This ratio is referred to in this report as a *utilization index*. If the city is acting in a non-discriminatory fashion, it should be choosing contractors randomly from the distribution of all qualified available contractors for this category. Therefore, a value for the utilization ratio for a particular minority group that is significantly less than 1.0 . . . provides prima facie evidence of discrimination against that minority group in city contracting practices.

The appropriate way of judging whether the minority utilization index for a particular contracting category is significantly less than 100 percent is through the use of sampling theory. Since it is unlikely that the city will give *precisely* the proportion of contract dollars to minorities as minorities represent in the available contracting pool, differences of the actual utilization ratios from the expected value of 100 percent must be judged using statistical tests of significance, which show whether particular patterns can reasonably be attributed to chance or indicate evidence of discrimination." Statistical Study at 1-2 (emph. in original).

analogous figures for Black construction contractors were 13.3 percent and 2.2 percent, and for Hispanics, 11 percent and 3.4 percent. *Id.* at Table 1.[17]

As *Croson* instructs, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform . . . and the number of such contractors actually engaged by the locality . . . an inference of discriminatory exclusion could arise." *Croson*, 488 U.S. at 509, 109 S.Ct. at 729;[18] *see also*, *Wygant*, 476 U.S. at 267, 294, 106 S.Ct. at 1857 (when the "availability of minorities in the relevant labor pool substantially exceed[s] those hired . . . one may draw an inference of deliberate discrimination . . . "). Here, the statistically significant disparities, based on appropriate comparisons, provide a reliable basis for inferring discriminatory conduct by the city of San Francisco against

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[17] These percentages translate into a statistical significance of -6.372 for Asians, -4.557 for Blacks, and -3.378 for Hispanics. Any number -2.0 or less (more negative) was considered statistically significant. *Id; see, Hazelwood School Distr. v. United States*, 433 U.S. 299, 308 n. 14, 97 S.Ct. 2736, 2742 n. 14, 53 L.Ed.2d 768 (1977) (standard deviation greater than two or three supports inference of discrimination); *Chicago Fire Fighters*, 736 F.Supp. at 930.

[18] In contrast, the city of Richmond relied only on the disparity between the number of prime contracts awarded to minority firms and the minority population in the city as a whole. The city of Richmond, the Court added, "does not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects . . . nor does the city know what percentage of total city construction dollars minority firms now receive . . . " *Croson*, 488 U.S. at 502, 109 S.Ct. at 725.

Asian, Black, and Hispanic construction companies seeking prime contracts with the city. *Croson*, 488 U.S. at 501, 109 S.Ct. at 725 (relevant statistical disparities alone may constitute prima facie proof of a pattern or practice of discrimination); *Chicago Fire Fighters*, 736 F.Supp. at 929-30 (statistically significant disparities provided strongest evidence of past discrimination by city).

In addition to statistics, the San Francisco Board of Supervisors was presented, over the course of several hearings, with written and oral testimony from many MBEs who complained that discriminatory practices kept them excluded from prime contracts with the city. *See*, Reporters Transcript of Hearings re Minority and Women Business Participation in City Contracting, Legislative File 284-88-2 L (hereafter "hearings") and "Supporting Communications" Legislative File 284-88-2(G); *See, also*, Legislative File, 422-88-2 D (October 1983 and 1988 HRC Reports entitled "Investigation into Minority and Women Business Participation in City Contracting [Comprehensive Edition]: Findings, Recommendations and Support Documentation"). While the record is too lengthy to summarize here, we mention some of the illustrative testimony.

A not uncommon complaint was that MBEs were denied prime contracts despite being the lowest bidder. In one instance, a Filipino owned construction materials company was the low bidder and was within the price guidelines on at least two bids, but was not awarded the contracts. *See e.g.*, Hearings, March 9, 1989 at 82-84. In another example, a MBE testified that a city purchaser refused to award a contract to him even though he was

the low bidder and was qualified to perform the contract. Hearings, February 2, 1989 at 41.

In other cases, qualified MBE firms were told they were not qualified, but were awarded contracts when outside parties evaluated the proposals. In one example, a city staff member called a MBE bidder and told him that "your proposal is ridiculous because you're not qualified" in an effort to get the bidder to withdraw. In that case, the Human Rights Commission hired an independent consultant to review the proposals and the MBE won the contract on the merits. Hearings, March 9, 1989 at 38-39. A MBE geo-technical environmental consulting firm was denied a contract ostensibly because its references were weak. The Human Rights Commission intervened and outside evaluators were hired.[19] Again, the MBE won the contract upon independent review. *Id.* at 41-43.

Complaints of discrimination by city staff were also buttressed by the testimony of Zula Jones, Contract Compliance Liaison for the Port of San Francisco. She told the Board that, "[i]t is well known at the Port that minorities are not welcome at the Port. I came there about five years ago and I found that the system that exists there, and in cases of engineers, the attitudes was that minorities were incompetent and they couldn't perform the kind of work, the highly technical work the Port produces." *Id.* at 31. She also testified that there was a general program of harassment of minority contractors by the staff at the

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[19] The HRC also discovered that the staff did not check the references for any of the other bidders on the contract.

Port, in an effort to discourage MBE/WBEs from bidding on contracts. *Id.* at 35-37.[20] One example she gave concerned an inspector on a construction contract who took three hundred photographs of a three week project. "[The inspector's] purpose for this [was] to try and throw the minority off the project by saying that he put too much water in the cement, et cetera. We found that was not the case. It's nothing but harassment." *Id.* In another example of harassment by city employees, a Latino construction contractor testified that he was told by an inspector that there were too many Hispanics on a MUNI (local railway) project and he was going to recommend that no more be hired. *Id.* at 47-48.

HRC officers and MBE/WBEs also gave examples of discrimination by white contractors. Numerous MBEs complained that white prime contractors would list them on their bid proposals but then replace them with white subcontractors upon being awarded the contract. *See e.g., id.* at 24-31. In other examples, MBEs were not taken on as sub-contractors by the majority primes even though they were the low bidders. *See e.g.*, Hearings, May 8 1989 at 15-18, 83-84. Another MBE testified that he called a

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[20] "SUPERVISOR GONZALES: Do you know [of] other incident[s] of harassment?

MS JONES: Yes, I do. Every one of the projects that I've monitored there's been a case, there's been a minority, whether it was a prime minority or sub, has been a case of harassment. . . .

SUPERVISOR GONZALES: So, in other words, that kind of harassment continues, even to this day?

MS JONES: Yes, it [does]." *Id.* at 34.

white broker concerning construction work on a city project and was told that "we don't need any minorities." Hearings, April 24, 1989 at 30.

The city found that the weight of the evidence before it and the HRC in 1983, 1984, 1988, and 1989, supported the conclusion that the city had engaged in discriminatory practices with respect to minority contractors and that remedial action was warranted. Specifically, the Board of Supervisors found, among other things, that "the statistical disparities can only be attributed to *discriminatory procurement practices of the City* against MBEs and WBEs. SF Admin Code, Ch. 12D.2 (Finding 11) (emph. added); *See also, id.* at Ch. 12D.9(A)(2). The city also attributed the statistical disparities in part to discrimination in the private sector against MBEs and WBEs that is "manifested in and perpetuated and exacerbated by the City's procurement practices." *Id.* at Ch. 12D.2 (Finding 11).[21]

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[21] The parties dispute whether, under *Croson*, San Francisco can rely on evidence of discrimination in the private sector to support the need for the 1989 ordinance. We need not determine whether a city could rely only on such evidence, since San Francisco has found discrimination on its own part. However, we conclude that evidence of discrimination in the private sector is relevant to the need for remedial action with respect to prime contractors. Allowing city construction project dollars to flow "through the local construction industry, [may make] the county a 'passive participant' in [discrimination]." *Coral Constr. Co.*, 729 F.Supp. at 738. For if the city supports private contractors that discriminate, this in turn may hinder the ability of MBEs to develop the necessary skills and experience to compete successfully as prime contractors.

The city further concluded that "[t]he City's 'old boy network' constitutes a closed business system created and implemented by the City for all contracts, including those subject to the competitive bid process. *Discrimination against . . . MBEs continue to persist in the City's procurement process* [sic]. The closed environment in which City businesses operate has excluded MBEs . . . and has placed them under a competitive disadvantage when competing for City prime contracts." *Id.* at Ch. 12D.2 (Finding 10) (emph. added).[22]

These findings, supported by the statistical and other evidence, satisfy us that the city will likely demonstrate that it has a "strong basis in evidence" for taking corrective action and that its asserted remedial purpose is genuine. *Croson*, 488 U.S. at 493, 500, 109 S.Ct. at 721, 724; *Cone*, 908 F.2d at 916 (testimony regarding complaints of discrimination combined with statistical disparities provided "more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a motion for summary judgment [by challenger to MBE plan]"). Accordingly, plaintiff is not likely to prevail on its claim that the challenged portions of the 1989 Ordinance fail to serve a compelling state interest.

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[22] These findings contrast sharply with the findings used to support the 1984 Ordinance. As the Ninth Circuit observed, those earlier findings did not address any prior discrimination by the city, but rather focussed on "historic discrimination." *AGCC-I*, 813 F.2d at 931-32.

B. *Narrowly tailored*

Besides serving a compelling state interest, race conscious remedies must be narrowly tailored to achieve that interest. As noted earlier, this requirement ensures that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493, 109 S.Ct. at 721. In *Croson*, the remedy selected was a requirement that non-MBE contractors subcontract at least 30 percent of the dollar amount of the contract to MBEs. *Id.* at 477, 109 S.Ct. at 712-13. Such a quota, the Court concluded, was not narrowly tailored to any goal, "except perhaps outright racial balancing." *Id.* at 507, 109 S.Ct. at 728.[23] In contrast, the five percent bidding preference adopted by San Francisco avoids any flat quota or set aside, imposes relatively little burden upon non-MBEs, and responds only to the identified discrimination.

As outlined earlier, the 1989 Ordinance excludes no one from bidding on any contract, and non-MBEs may invoke the exact same preference available to MBEs through a joint venture. In addition, non-MBEs have no settled expectation in attaining any given contract, and the effect of the preference, if any, is spread over a large number of persons. In *Metro Broadcasting*, 110 S.Ct. at 3026, the Supreme Court recently observed that racial preferences in comparative hearings for FCC licenses contravene " 'no legitimate firmly rooted expecta-

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[23] During the five year period from 1978 to 1983, 0.67 percent of the city of Richmond's prime construction contracts had been awarded to MBEs, although Richmond's population was 50 percent Black. *Croson*, 488 U.S. at 479, 109 S.Ct. at 714.

tion[s]' " of competing applicants, thus rendering the burden on non-minorities "slight." We believe the same can be said here, particularly given that, in the past, non-MBEs "may have reaped competitive benefit over the years from the virtual exclusion of minority firms from . . . contracting opportunities." *Fullilove*, 448 U.S. at 485, 100 S.Ct. at 2778.

Nor is there any indication that the 1989 ordinance is resulting in any actual undue burden. As noted earlier, during the first six months of its duration, the vast majority (92.7 percent) of all prime contract dollars awarded to San Francisco firms went to non-MBEs.[24] Nor has any member of plaintiff contended that it was denied a contract because of the MBE preference.

The form of the remedy also corresponds to the identified discrimination. The city found that its discriminatory procurement practices and an effective "old boys network" created a "competitive disadvantage" for MBEs. SF Admin. Code, Ch. 12D.2 (Findings 10-11). The bidding preference provides a modest "competitive plus" to offset this disadvantage and nothing more. *Id.* (Finding 7). Moreover, unlike the Richmond plan, which improperly linked its remedy to general population statistics. *Croson*, 488 U.S. at 507, 109 S.Ct. at 728, the five

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[24] Plaintiff suggests that these figures demonstrate that the 1989 Ordinance is not narrowly tailored because, at least so far, it has not achieved its purpose of significantly increasing the number of prime contracts awarded to MBEs. However, the dearth of MBE contracts may be more of an indication that the remedy chosen, if anything, is too narrow to achieve its remedial goal, rather than not narrow enough.

percent bidding preference was selected in light of MBE availability figures (23.6 percent for Asian construction firms, 13.37 percent for Black, and 11 percent for Hispanic). *See* Exh. A, Plaintiff's Opening Brief (Defendant's Response to Interrogatory No. 7); *cf., Cone Corp.*, 908 F.2d at 914 (narrowly tailored plan must further some goal "other than outright racial balancing"); *Contractors Ass'n of Eastern Pa., Inc. v. City of Philadelphia*, 735 F.Supp. 1274, 1298 (E.D.Pa.1990) (MBE plan not narrowly tailored given that 15 percent set aside was an admittedly arbitrary choice and city "did not even know the number of capable MBEs existing in the Philadelphia area").

The "competitive plus" is also limited to those qualifying MBEs that are economically disadvantaged.[25] SF Admin Code, Chs. 12D.4, 12D.5 (definition of "MBE"). As the Eleventh Circuit recently noted, targeting the remedy in this manner helps ensure that "its benefits [go] to those MBEs most likely to have been discriminated against . . . " since larger, more successful firms are more likely to have overcome the effects of discrimination than smaller, struggling ones. *Cone Corp.*, 908 F.2d at 917.

The remedy is circumscribed in other ways as well. It is limited to MBEs in San Francisco, and thus avoids extending its benefits to groups not shown to have been

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[25] An economically disadvantaged business is any business whose "average gross annual receipts in the three fiscal years immediately preceding its application for certification as a MBE or WBE does not exceed the following limits: (1) Public Works/Construction—$14 million; (2) Goods/Materials and General Services Suppliers—$2 million; (3) Professional Services—$2 million." SF Admin Code, Ch. 12D.5

subjected to discriminatory practices. SF Admin Code, Ch. 12D.5 (definitions of MBE and Local Business); *cf., Croson*, 488 U.S. at 508, 109 S.Ct. at 729 (Richmond plan granting preference to MBE anywhere in the country obviously not narrowly tailored). It also limits its reach to specific minority groups for which the evidence supported a finding of discrimination—Asians, Blacks, and Hispanics. *Cf.; Croson*, 488 U.S. at 506, 109 S.Ct. at 727-728 (criticizing the Richmond plan for the "random inclusion" of racial groups that may never have suffered from discrimination in the Richmond city construction industry).

Bid preferences are also limited to those particular types of contracts for which evidence of discrimination was found. For example, the bid preference does *not* apply to Asian or Hispanic architectural/engineering firms, Hispanic computer system or management consultant firms, or Black medical services firms. SF. Admin. Code, Ch. 12D.11(A)(3)-(A)(6).

The 1989 Ordinance is also of very limited duration (three years), and provides for waiver of the bid preferences under certain circumstances. SF Admin Code, Chs. 12D.13, 12D.15(E). It also directs the HRC to provide for administrative procedures allowing any business to directly file a complaint requesting that the bid preference not be applied to that industry (e.g. construction industry) because MBE participation in city prime contracts has reached parity with their number in the relevant industry community and MBEs no longer suffer from a discrimination induced competitive disadvantage. SF Admin Code, Ch. 12D.6(A)(4); Rosales Decl. in Opposition to Application for TRO, Exh. A.

Plaintiff objects that the city did not sufficiently consider race neutral alternatives. *Croson*, 488 U.S. at 507, 109 S.Ct. at 728 (Richmond plan not narrowly tailored given failure to consider race neutral alternatives). As noted earlier, the city initially sought to address the problem of discrimination in the realm of city contracts with legislation that prohibited discrimination in employment; the HRC staff has also intervened and mediated complaints of discrimination brought to its attention, *see e.g.*, Hearings, April 24, 1989 at 16-17 (testimony of HRC Director Peter Jamero). However, these efforts failed to reduce complaints of discrimination, and did not ameliorate the discriminatory procurement practices of the city.[26] The city also considered whether to "(1) create a special revolving fund to assist newly established MBEs and WBEs to meet bonding and other fee-related requirements; and (2) relax or waive bonding requirements on certain contracts to facilitate MBE/WBE participation." SF Admin. Code, Ch. 12D.2 (Finding 13). However, the city concluded that these were not viable options. "In view of the City's budgetary constraints and the opposition voiced by segments of the local business community, this Board finds that creation of a special revolving fund, or relaxation or waiver of bonding requirements is not feasible at this time." *Id.; see also*, Hearings, April 24, 1989, at 22-24, and May 8, 1989 at 37; Cal. Const. Art. XVI, § 6 (prohibiting gifts or loans of public monies or pledging of credit prohibited); *cf., Contractors Ass'n of Eastern*

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[26] Pursuant to San Francisco city charter section 3.501, the Board of Supervisors lacks authority to terminate or otherwise discipline city staff. Rather, this authority is exclusively vested in the head of each city department.

Pa. Inc., 735 F.Supp. at 1298 (MBE plan not narrowly tailored given city's failure to investigate race neutral alternatives and reject them as "not viable or practical").

Plaintiff also contends that the bid preference is not "narrowly tailored" because it is not limited to actual past victims of discrimination, emphasizing the court's observation in *Croson* that the Richmond plan failed to provide for any "inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors." 488 U.S. at 508, 109 S.Ct. at 729. This observation was made in the context of the court's strong reaction to the Richmond plan's rigid 30 percent quota—a quota which granted an "absolute preference" to MBEs anywhere in the country based solely on race and without any demonstration that remedial action was necessary. *Id.* We decline to read this language as precluding local governments from *ever* utilizing *any* type of race conscious remedy to serve the compelling state interest of remedying the effects of identified discrimination--particularly where, in contrast to the Richmond plan, the remedy is limited to a discrete group, which the city admits to discriminating against, and the remedy is narrowly tailored to rectify the identified discrimination. Concluding otherwise would, in fact, inexplicably nullify the court's subsequent comment that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Id.* at 509, 109 S.Ct. at 729.[27]

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[27] *See also, id.* ("Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified"); note 13, *supra*.

As that comment indicates, the Court left open the possibility of voluntary city sponsored race conscious remedies under *some* circumstances; *see also, Wygant*, 476 U.S. at 287, 106 S.Ct. at 1854 ("[The *Wygant* court has] agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored' ") (O'Connor, J. concurring). Yet, an iron clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race conscious remedy superfluous. For such a remedy could be applied solely on the basis of the beneficiary's status as a "past victim" and without reference to any racial classification at all. In other words, "[a] remedy that goes to the actual victim is not race-conscious at all, it is victim-conscious." Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement*, 99 Yale L.J. 155, 161 (1989).[28]

In sum, the modest five percent bidding preference enacted by San Francisco is of a wholly different nature than the outcome-determinative, "grossly overinclusive" legislation enacted by the city of Richmond. *Croson*,

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[28] While we conclude, for the reasons set forth above, that *Croson*, does not preclude all race conscious relief, with respect to municipal actors, we note that in both the *Fulilove* and the *Coral Constr. Co.* cases, the respective governmental entities included a waiver provision that allowed them to waive a preference where a bidding MBEs higher price was not attributable to the effects of past discrimination. *See Croson*, 488 U.S. at 508, 109 S.Ct. at 728. While its absence may not be fatal to the 1989 Ordinance, its inclusion would further strengthen San Francisco's position that its remedy is narrowly tailored.

488 U.S. at 506, 109 S.Ct. at 728. For the reasons discussed above, the 1989 Ordinance's scaled-down, measured approach appears to preclude the "possibility that the motive for the classification was illegitimate racial prejudice or stereotype," *Croson*, 488 U.S. at 493, 109 S.Ct. at 721, rather than remedial. Thus, we conclude that plaintiff has not shown that it is likely to succeed on its contention that San Francisco's plan is insufficiently tailored to satisfy the strictures of the equal protection clause of the fourteenth amendment.

IV. CONCLUSION

Plaintiff has not persuaded this court that it is likely to succeed on its claim that the 1989 Ordinance fails to serve the compelling interest of remedying the effects of past discrimination by the city of San Francisco against San Francisco based MBEs, or its claim that challenged portions of the Ordinance are not narrowly tailored to that goal. This assessment of plaintiff's constitutional claim also leads us to conclude that plaintiff has not demonstrated a sufficient threat of irreparable injury to warrant a mandatory injunction at this juncture. Nor has plaintiff demonstrated that the balance of hardships tips sharply in its favor. Accordingly, plaintiff's motion for an order preliminarily enjoining the challenged provisions of the 1989 Ordinance is denied.

IT IS SO ORDERED.

APPENDIX C

Amendment of the Whole
As Amended in Committee
5/15/89

ORDINANCE NO. 175-89

FILE NO. 284-88-2

(Minority, Women and Local Business Enterprises–Prime Contracts) AMENDING THE SAN FRANCISCO ADMINISTRATIVE CODE BY ADDING CHAPTER 12D THERETO, RELATING TO THE PROCUREMENT OF GOODS AND SERVICES AND THE AWARD OF PUBLIC CONTRACTS BY THE CITY AND COUNTY OF SAN FRANCISCO FROM MINORITY BUSINESS ENTERPRISES, WOMEN BUSINESS ENTERPRISES, AND LOCAL BUSINESSES.

Note: All sections are new.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The San Francisco Administrative Code is hereby amended by adding Chapter 12D thereto, to read as follows:

CHAPTER 12D. *MINORITY/WOMEN/LOCAL BUSINESS ENTERPRISES.*

Sec. 12D.1. *Short Title.*

This ordinance shall be entitled the "Minority/Women/Local Business Utilization Ordinance" and may be cited as the "MBE/WBE/LBE Ordinance – II."

Sec. 12D.2. *General Findings.*

The Board of Supervisors having adopted Ordinance No. 139-84 on April 2, 1984 to address identified discriminatory practices inherent in the City's procurement process which resulted in the virtual exclusion of minority and women owned businesses as contractors on City prime contracts and to offset economic disadvantages faced by local businesses that are not shared by nonlocal businesses;

And Ordinance No. 139-84 being remedial in nature will expire June 30, 1989 and thus required the Human Rights Commission to study minority and woman owned business participation in City contracting prior to the expiration of that Ordinance;

And the Human Rights Commission, pursuant to Section 12D.15. of Ordinance No. 139-84 having in June and July of 1988 heard the testimony of forty-two witnesses, reviewed the transcript and written submittals of one hundred and twenty-seven minority, women, local and other business representatives, studied the testimonial and statistical evidence presented by the public, City departments, and the Commission's staff to ascertain whether the objectives of Ordinance No. 139-84 had been met and having submitted its October 23, 1988 report to this Board entitled "Investigation into minority and Women Business Participation in City Contracting, Comprehensive Edition: Findings, Recommendations and Support Documentation";

And the United States Supreme Court on January 23, 1989 having decided *City of Richmond v. Croson* which addresses the constitutionally acceptable quantum of

evidence that enables a municipality to adopt a race-conscious remedial ordinance in public contracting;

And the Budget Analyst at the request of this Board having studied the participation of minority and woman owned businesses in City contracts at the prime contractor level during fiscal year 1987-1989 and compared this business participation to minority and women businesses' share of their relevant respective industries or professions and having submitted his report dated March 8, 1989 and his revised report dated March 17, 1989 to this Board;

And BPA Economics, Inc. at the request of the City Attorney and the Director of the Human Rights Commission having evaluated statistical evidence provided by City departments and the Budget analyst, conducted a statistical analysis of these data and having submitted its report entitled "Statistical Support for San Francisco's MBE/WBE/LBE Ordinance, dated May 1, 1989 and his revised report dated May 15, 1989, to this Board;

And this Board, having conducted ten additional public hearings, taken additional testimony and written submittals, and reviewed the 1983 and 1988 reports of the Human Rights Commission, the 1989 reports of the Budget Analyst, and the 1989 report of BPA Economics, Inc. (all of which shall be incorporated herein by reference) and relying upon this Board's knowledge about the City's compliance with Ordinance No. 139-84, such knowledge having been acquired during the past five years,

This Board hereby makes the following findings:

1. Local businesses that seek to enter into contracts with the City and County of San Francisco continue to labor under a competitive disadvantage with businesses from other areas because of the higher administrative costs of doing business in the City (e.g. higher taxes, higher rents, higher wages and benefits for labor, higher insurance rates, etc.).

2. The public interest is served by continuing to encourage business to locate and remain in San Francisco through the provision of a minimal "good faith" preference to local businesses in the award of City contracts.

3. Policies and programs that enhance the opportunities and entrepreneural skills of minority owned, woman owned, and local businesses will best serve the public interest because the growth and development of such businesses will have a significant positive impact on the economic health of the City and will serve to reduce racial tension in our community.

4. The testimony of businesses that seek to enter into contracts with the City or are doing business with the City, as presented to this Board and as detailed in the Human Rights Commission's 1988 report, offer clear and persuasive reasons for the Board of Supervisors to take the actions proposed by this Ordinance to remedy: (1) City contracting practices and community conditions that cause the exclusion or reduce the opportunities of minority and woman owned businesses to be awarded City contracts to such an extent that the amount of City contract dollars awarded to them can only be explained by discrimination; and (2) competitive disadvantages

local business continue to face in providing goods and services to the City.

5. Outreach and advertising efforts by City departments have served to draw more minority and woman business enterprises into the City's procurement process. The City needs to intensify its outreach and advertising efforts as well as its education/training programs to reach a broader segment of the MBE/WBE community. However, past experience has taught that outreach and advertising efforts alone are not enough to remedy the exclusion of minority and women owned businesses as prime contractors with the City.

6. Ordinance No. 139-84 has provided City departments with uniform standards and criteria in the award of contracts. However, these standards have not been applied consistently City wide. This inconsistent application of the Ordinance continues to give preference to majority businesses in the prime award process to the detriment of minority and woman business enterprises.

7. The bid preference mechanism has the advantage of affording minority, woman and local business enterprises a competitive "plus" when bidding or proposing on City contracts. The bid preference mechanism does not exclude any potential contractor. It encourages competition and thereby ensures that the City is contracting with responsible, efficient contractors. Consequently, the bid preference mechanism has assisted minority, woman and local business enterprises to obtain City contracts. The bid preference is allowed to joint ventures where MBEs and WBEs participate at a managerial and entrepreneural level with nonminority and nonwoman entrepreneurs.

Affording the bid preference to joint ventures has encouraged nonMBE/WBEs to enter into joint venture agreements with MBE/WBEs and compete for City contracts. Several joint ventures of minority/woman and majority/male owned firms have won large construction and professional services contracts with the assistance of the bid preference. The evidence in the record before this Board supports the conclusion that the bid preference invites participation by formerly excluded businesses and hence promotes more competition, resulting in more competitive bids submitted to the City.

8. Set-asides of contracts, where competition for selected contracts is limited to MBE/WBEs or joint ventures with MBE/WBEs, have been authorized by the Director of the Human Rights Commission only on rare occasions over the past five years. The Director has regarded the contract set-aside mechanism as a measure to be used in last resort type cases where a department can demonstrate, despite its good faith efforts and the application of the bid preference, that it has failed substantially to eliminate the exclusion of MBEs and WBEs from City contracting. Despite the claim by several departments that the contract set-aside mechanism is essential to ensure participation by MBE/WBEs, the City has made steady progress City wide toward the MBE/WBE goals while only making sparing use of the contract set-aside mechanism.

9. Without the Ordinance, many small MBE/WBEs would be unable to compete for and win awards of prime City contracts.

10. Some City departments continue to operate under the "old boy network" when awarding contracts. The City's "old boy network" constitutes a closed business systems created and implemented by the City for all contracts, including those subject to the competitive bid process. Discrimination against and insensitivity to MBEs and WBEs continue to persist in the City's procurement process. The closed environment in which City businesses operate has excluded MBEs and WBEs and has placed them under a competitive disadvantage when competing for City prime contracts.

11. The statistical evidence before this Board relating to the award of contracts subject to this ordinance for fiscal year 1987-1988 reflects that in almost all areas of contracting MBEs (each ethnic group identified as a minority) and WBEs continue to be awarded contract dollars that are disproportionately lower than the available numbers of MBEs and WBEs in San Francisco. These data are gathered and summarized in Appendix X, which contains utilization indices described as Tables 1 through 7, and 10 through 11, and is attached to this Ordinance and incorporated herein by reference as though fully set forth. These utilization indices measure the disparity between MBEs (as a group and each ethnic group identified as a minority) or WBE participation in City prime contracts and their share of their relevant industry or profession. That disparity is measured in terms of a statistical significance. When measure of the statistical significance is minus two (-2) or less, the Board concludes that the disparity cannot be attributed to chance. Based upon the weight of the testimony and other evidence before this Board and the Commission in 1983, 1984, 1988

and 1989, the Board finds that the statistical disparities can only be attributed to discriminatory procurement practices of the City against MBEs and WBEs.

Based on the testimony and other evidence before this Board and the Commission in 1983, 1984, 1988 and 1989, the Board finds that the aforementioned statistical disparities are also attributed to discrimination in the private sector against MBEs and WBEs that is manifested in and perpetuated and exacerbated by the City's procurement practices.

12. Consistent with Ordinance No. 139-84, on December 19, 1988 the Board of Supervisors adopted legislation which requires the City's Risk Manager to develop uniform insurance requirements for City contracts. On May 2, 1989 the Risk Manager established these uniform standards which are set forth in a document entitled "Contract Insurance Manual". This manual is intended to be a guide for contract administrators to standardize bond and insurance requirements in City contracts.

13. Consistent with Ordinance No. 139-84, the Board of Supervisors has also considered whether to: (1) create a special revolving fund to assist newly established MBEs and WBEs to meet bonding and other fee-related requirements; and (2) relax or waive bonding requirements on certain contracts to facilitate MBE/WBE participation. In view of the City's budgetary constraints and the opposition voiced by segments of the local business community, this Board finds that creation of a special revolving fund, or relaxation or waiver of bonding requirements is not feasible at this time.

Sec. 12D.3. *Declaration of Policy.*

It is the policy of the City and County of San Francisco to ensure full and equitable opportunities for Minority Business Enterprises, Woman Business Enterprises, and local businesses to participate as prime contractors in the provision of goods and services to the City. This program is intended to correct identified discriminatory practices inherent in the City's procurement process and in the award of prime contracts to MBE/WBEs and to develop their status and capability as prime contractors of the City. Another goal of this Ordinance is to offset some of the economic disadvantages local businesses continue to face that are not shared by nonlocal businesses.

The City will continue to rely on the relationship between the percentages of minority (each ethnic group identified as a minority) and woman owned businesses in the relevant sector of the San Francisco business community and their respective shares of City contract dollars as a measure of the effectiveness of this Ordinance in remedying the effects of the aforementioned discrimination.

The City is continuing to use a preference for local business in the award of City contracts in order to encourage business to locate and remain in San Francisco and thereby enhance employment opportunities for persons living in San Francisco. The cost of locating and doing business in San Francisco continues to be as much as 15% and greater than the cost of doing business in the surrounding communities; affording a 5% bid preference for local businesses bidding on City contracts reduces the disadvantages under which City located businesses labor when competing for City contracts. affording them a 5%

bid preference makes good sense. In effect the bid preference assists these businesses in contributing to the economic health of the City. The 5% bid preference does not unduly hamper non-local businesses in the contracting process, and parallels the preferences awarded in many other local jurisdictions.

Sec. 12D.4. *Scope.*

The race and gender-conscious bid preferences of this Ordinance shall be afforded only to economically disadvantaged minority and woman owned businesses in all specifically enumerated categories of City contracts for the procurement of goods and services subject to exemptions hereinafter specifically enumerated. The local business bid preference shall be afforded to all local businesses in the award of all City contracts for the procurement of goods and services subject to exceptions hereinafter specifically enumerated in Section 12D.13.

Sec. 12D.5. *Definitions.*

"Award of a Contract" occurs when a contract is certified by the Controller of the City and County of San Francisco.

"Bid" shall mean and include a quotation, proposal, solicitation or offer by a bidder or contractor to perform or provide labor, materials, supplies or services to the City and County of San Francisco for a price.

"Bidder" shall mean any business that submits a quotation, bid or proposal to provide labor, materials, supplies or services to the City and County of San Francisco.

"City" shall mean the City and County of San Francisco.

"Commission" shall mean the Human Rights Commission of the City and County of San Francisco.

"Contract" shall mean and include any agreement between the City and a person to provide or procure labor, materials, supplies or services to, for or on behalf of the City and County of San Francisco. A "contract" shall include an agreement between the City and a non-profit entity to perform construction-related services. A "contract" does not include: (1) awards made by the City with Federal/State grant or City general fund monies to a non-profit entity where the City offers assistance, guidance, or supervision on a project or program and the recipient of the grant award uses the grant monies to provide services to the community; (2) sales transactions where the City sells its personal or real property; (3) a loan transaction where the City is acting as a debtor or a creditor; (4) lease, franchise, or concession agreements; or (5) agreements to use City real property.

"Contract Awarding Authority" shall mean the City officer, department, commission, employee or board authorized to enter into contracts on behalf of the City.

"Contractor" shall mean any person(s), firm, partnership, corporation, or combination thereof, who submits a bid, performs any part of, agrees with a person to provide services relating to and/or enters into a contract with department heads and officers empowered by law to enter into contracts on the part of the City for public works or improvements to be performed, or for goods and services or supplies to be purchased at the expense of

the City or to be paid out of monies deposited in the treasury or out of trust monies under the control of or collected by the City.

"Controlled" for the purposes of determining whether a business is a Minority Business Enterprise, or Women Business Enterprise, shall mean the minority(ies), the woman or combination of minorities and women, as the context requires, shall (1) possess legal authority and power to manage business assets, good will and daily operations of the business; and (2) actively and continuously exercise such authority and power in determining the policies and directing the operations of the business.

"Director" shall mean the Director of the Human Rights Commission of San Francisco.

"Economically Disadvantaged Business" shall mean a business whose average gross annual receipts in the three fiscal years immediately preceding its application for certification as a MBE or WBE does not exceed the following limits: (1) Public Works/Construction–$14 million; (2) Goods/Materials and General Services Suppliers–$2 million; (3) Professional Services–$2 million.

"Equipment and Supplies Contract" shall mean term purchase agreements, contract orders, purchase orders and any other agreement for the purchase of transportation equipment, office supplies, data processing and office equipment, hospital and medical equipment and supplies, food, building supplies, fire/safety equipment and supplies, clothing, miscellaneous and electrical equipment and supplies.

"General Services Contract" shall mean term purchase agreements, contract orders, purchase orders and any other agreement for the procurement of janitorial, security, equipment and computer maintenance, miscellaneous, printing and graphics services.

"Good Faith Efforts" shall mean the actions undertaken by a department to obtain MBE or WBE participation in a contract, and shall include the following efforts: (1) encouraging MBE/WBEs to attend pre-bid meetings, scheduled by a department or the Commission, to inform potential contractors of contracting opportunities; (2) advertising in general circulation media, trade association publications and minority/woman business focus media; (3) notifying MBE/WBEs who are available to perform the work contemplated in a contract, soliciting their interest in the contract; (4) dividing the contract work into economically feasible units to facilitate MBE/WBE participation in the contract; (5) pursuing solicitations of interest by contacting MBE/WBEs to determine whether these businesses are interested in participating on the contract; (6) providing MBE/WBEs with adequate information about the plan, specifications and requirements of the contract; (7) where applicable, negotiating with MBE/WBEs in good faith and demonstrating that MBE/WBEs were not rejected as unqualified without sound reasons based on a thorough investigation of their capabilities; and (8) using the services of available community and contractors' groups, local, State or Federal minority and woman business assistance offices that provide assistance in the recruitment of MBE/WBEs for public sector contracts.

"Human Rights Commission" (HRC) shall mean the Human Rights Commission of San Francisco, consisting of Commissioners appointed by the Mayor; hereinafter, it shall be referred to as the Commission.

"Joint venture" shall mean and may be referred to as an "Association" of two or more businesses acting as a contractor and performing or providing services on a contract, in which each joint venture or association partner combines property, capital, efforts, skill, and/or knowledge.

"Local Business" or "Local Business Enterprise (LBE)" shall mean a business firm: (1) with fixed offices or distribution points located within the geographical boundaries of the City and County of San Francisco; (2) listed in the Permits and License Tax Paid File with a San Francisco business street address; and (3) which possesses a current Business Tax Registration Certificate at the time of the application for certification as a local business. Post Office box numbers or residential addresses shall not suffice to establish status as a "Local Business". To qualify as a "Local Business" or "LBE" a business must establish that it has been located and doing business in San Francisco for at least six months preceding its application for certification as a local business.

"Minority", "Minorities", or "Minority person" shall mean members of one of the following ethnic groups: Asians (defined as Chinese, Japanese, Koreans, Pacific Islanders, Samoans, Filipinos, and Southeast Asians), Blacks, and Latinos (defined as Mexicans, Puerto Ricans, Cubans, Central or South Americans).

"Minority Business Enterprise (MBE)" shall mean an economically disadvantaged local business which is an independent and continuing business for profit, performs a commercially useful function, and is owned and controlled by one or more minority persons residing in the United States or its territories.

"Office" or "Offices" shall mean a fixed and established place where work is carried on of a clerical, administrative, professional or production nature directly pertinent to the business being certified. A temporary location or movable property or one that was established to oversee a project such as a construction project office does not qualify as an "Office" under the Ordinance.

"Owned", for purposes of determining whether a business is a minority business enterprise or woman business enterprise, shall mean that the minorities or women as the context requires, shall possess an ownership interest of over fifty percent (50%) of the business, and shall:

1. Possess incidents of ownership, such as an interest in profit and loss, equal to at least the required ownership interest percentage; and
2. Contribute capital, equipment and expertise to the business equal to at least the required ownership percentage.

Ownership of an individual seeking MBE or WBE certification shall be measured as though the applicant's ownership is not subject to the community property interest of a spouse, if both spouses certify that (a) only the woman or minority spouse participates in the management of the business and (b) the non-participating spouse relinquishes control over his/her community property

interest in the subject business; or both spouses have bona fide management and control of the business.

"Participation Goals" shall mean the targeted levels of City wide MBE/WBE participation in City prime contracts that reflect the relevant share of MBEs or WBEs in a given industry or profession referred to as "percent availability" in the utilization indices contained in Appendix X to this Ordinance.

"Percent Availability" see "Participation Goals"

"Person" includes one or more individuals, partnerships, associations, organizations, trade or professional associations, corporations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers, or any group of persons, including any official, agent or employee of the City and County of San Francisco.

"Professional Services Contract" shall mean agreements for the procurement of legal, architect/engineer, computer systems, management consulting, and medical services.

"Woman Business Enterprise (WBE)" shall mean an economically disadvantaged local business which is an independent and continuing business for profit, performs a commercially useful function and is owned and controlled by one or more women residing in the United States or its territories.

"Woman/Minority Man Business Enterprise (W/MBE)" shall mean an economically disadvantaged local business which meets the definition of an MBE or WBE, except that the aggregate ownership interest of the woman and the minority man equals or exceeds over fifty

percent (50%) of the business. An W/MBE shall qualify and be deemed by a department an MBE or WBE, but not both, for purposes of this Ordinance. Any reference to this Ordinance to MBE or WBE includes a W/MBE.

Sec. 12D.6. *Powers and Duties of the Commission and the Director.*

(A) In addition to the duties and powers given to the Human Rights Commission elsewhere, the Commission shall:

1. collect and analyze relevant data which will assist the Board of Supervisors in determining whether race or gender-conscious remedies are appropriate and necessary for contracts not subject to the race and gender-conscious bid preferences of this Ordinance. The Commission shall periodically report the results of this study to this Board;

2. levy sanctions as specified in Section 12D.8.(B) 7.;

3. when necessary, subpoena persons and records, books and documents for a proceeding of the Commission or an investigation by the Director conducted to further the purposes of this Ordinance;

4. amend existing rules and regulations establishing standards and procedures for effectively carrying out this Ordinance. The rules and regulations shall provide for administrative procedures which will allow a business to prove and the Commission to recommend to this Board that the Ordinance's remedial measures should not be applied to an industry or profession because MBE/WBE participation in City prime contracts has

reached parity with their numbers in the relevant business community and MBE/WBEs no longer suffer from a discrimination induced competitive disadvantage in the applicable industry or profession.

(B) In addition to the duties and powers given to the Director elsewhere, the Director shall:

1. through appropriately promulgated procedures, certify businesses as bona fide MBEs/WBEs/LBEs. These procedures shall provide that any business seeking certification as a local business shall meet the definition of a LBE and possess or establish all of the following: (1) business cards for the San Francisco office; (2) business stationery for the San Francisco office; (3) written agreement for occupancy of the San Francisco office; (4) that the business is listed in an appropriate business buyers guide such as a telephone yellow pages; (5) that business is transacted in the San Francisco office; (6) a conspicuously displayed business sign at the San Francisco business premises; and (7) the office is appropriately equipped for the type of business for which certification as a LBE is sought.

If the Director denies an application for certification as a MBE, WBE, LBE or a business' certification as a MBE, WBE, LBE is revoked by the Director because the business is not a bona fide MBE, WBE, LBE, the aggrieved business may reapply to the Director for certification six months after the denial or revocation. Except as provided in Section 12D.14.(C), the Director's denial or revocation or certification as a MBE, WBE, LBE shall not be appealable to the Commission;

2. annually, and more often if he deems necessary, analyze the most recently available data on "percent availability" of MBEs and WBEs in the various industries and professions identified in the utilization indices set forth in Appendix X to this Ordinance. Applying statistically sound methods of analysis, the Director shall identify areas of contracting where the City or its departments are failing to meet the participation goals to such an extent that an inference of discrimination can be made. In addition, the Director shall identify areas of contracting where the City is meeting and/or exceeding participation goals to such an extent that the MBE or WBE bid preferences can no longer be justified. The results of this study shall be included in the Commission's annual report required by Section 12D.15. (C).

Not later than March 1st of each fiscal year, the Director shall transmit to the Board of Supervisors proposed amendments to this Ordinance and the utilization indices necessitated by the data he has collected and analyzed;

3. by July 1 of each fiscal year subject to this Ordinance, inform the Controller of the data each department is required to provide the Controller on each contract award. This data shall form the basis of the Commission's report to the Mayor, Board of Supervisors and Chief Administrative Officer and the public on the participation of MBEs and WBEs on City prime contracts subject to the Ordinance;

4. provide information and other assistance to MBEs and WBEs to increase their ability to compete effectively for the award of City contracts;

5. assist the City to increase participation by MBEs and WBEs in City contracts;

6. continue to develop and strengthen education and training programs for MBEs and WBEs and City contract awarding personnel;

(C) The requirements of this Ordinance are separate from those imposed by the United States or the State of California as a condition of financial assistance or otherwise; however, the Director may authorize the substitution of such State or Federal Minority Business Enterprise and Women Business Enterprise requirements for the requirements of this Ordinance whenever such State or Federal requirements are substantially the same as those of this Ordinance.

(D) The Director, with the approval of the Commission, may enter into cooperative agreements with agencies, public and private, concerned with increasing the utilization of MBEs and WBEs in government contracting, subject to the approval of the Board of Supervisors of the City and County of San Francisco.

SEC. 12D.7. *Powers and Duties of the Controller.*

(A) In addition to the duties given to the Controller elsewhere, the Controller shall work cooperatively with the Director to assemble and maintain the date the Director advises are necessary to form the basis of the Commission's report to the Mayor, Board of Supervisors, Chief Administrative officer and the public on the participation of MBEs and WBEs in City prime contracts.

(B) The Controller shall not certify the award of any contract subject to this Ordinance until the department

requesting certification of the award of the contract has provided the Controller with the information the Director advises is necessary under this Ordinance.

Sec. 12D.8. *Powers and Duties of the Mayor, Departments or Contract Awarding Authorities.*

(A) In addition to the duties given to the Mayor elsewhere, the Mayor shall:

1. by July 1 of each fiscal year subject to this Ordinance, issue notices to all City departments informing them of their duties under this Ordinance. The notice shall contain the following information: (1) the City wide MBE/WBE participation goals that departments are expected to use good faith efforts to attain during the fiscal year and that a department's failure to use good faith efforts to attain the MBE/WBE participation goals shall be reported to the Board of Supervisors and Chief Administrative Officer in the Commission's annual report; and (2) the data each department is required to provide the Controller on each contract award;

2. pursuant to Charter Section 3.100, coordinate and enforce cooperation and compliance by all departments with this Ordinance.

(B) Contract awarding authorities or in the case of a professional services contract, the department making the contract award recommendation, shall:

1. use good faith efforts to solicit and obtain quotes, bids or proposals from MBEs and WBEs on all solicitations, or document their unavailability;

2. unless otherwise indicated in this Ordinance and except where prohibited by State or Federal law or

regulation, extend a preference in all bids and contracts and in the composition of rating scales as follows: (1) a five percent (5%) preference to (i) a local business or (ii) a joint venture with local MBE or local WBE participation which equals or exceeds thirty-five percent (35%) but is under fifty-one percent (51%); (2) a ten percent (10%) preference to (i) a local MBE or local WBE or (ii) a joint venture with local MBE or local WBE participation which equals or exceeds fifty-one percent (51%).

A joint venture shall receive a bid preference when the MBE or WBE partner is responsible for a clearly defined portion of the work to be performed, and shares in the ownership, control, management responsibilities, risks, and profits of the joint venture. The portion of the MBE or WBE joint venturer's work shall be set forth in detail separately from the work to be performed by the nonMBE or nonWBE joint venture partner. The MBE or WBE joint venturer's portion of the contract must be assigned a commercially reasonable dollar value;

3. arrange contracting by size and type of work to be performed so as most effectively to enhance the opportunity for participation by MBEs and WBEs to the maximum extent feasible;

4. adjust bid bonding and insurance requirements as recommended by the City Risk Manager in his May 2, 1989 "Contract Insurance Manual";

5. utilize a revolving fund as may be established by the City to assist MBEs and WBEs to meet bonding, insurance and other fee-related requirements;

6. submit to a central office all current bids, requests for proposals, and solicitations with sufficient lead time to provide adequate notice and opportunity to MBEs and WBEs to participate;

7. impose such sanctions or take such other actions as are designed to ensure compliance with the provisions of this Ordinance, which shall include, but are not limited to:

(a) refusal to grant the award of a contract;

(b) order the suspension of a contract;

(c) order the withholding of funds;

(d) order the revision of a contract based upon a material breach of contract provisions pertaining to MBE or WBE participation;

(e) disqualification of a bidder, contractor, subcontractor, or other business from eligibility for providing goods or services to the City for a period not to exceed five years, with a right to review and reconsideration by the Commission after two years upon a showing of corrective action indicating violations are not likely to reoccur; and

8. not award any contract to a person or business which is disqualified from doing business with the City under the provisions of this Ordinance, nor shall any contract be awarded to any person or business which is disqualified from doing business with any governmental agency based on failure to comply with Minority or Women Business Enterprise or contract compliance requirements which are substantially the same as those of this Ordinance.

9. designate a staff person to be responsible for responding to the Director and Commission and to the requirements of this Ordinance.

10. maintain accurate records for each contract awarded, its dollar value, the nature of the goods or services to be provided, the name of the contractor awarded the contract, the efforts made by a construction, architect/engineer contractor to solicit bids from and award subcontracts to MBEs and WBEs.

11. where feasible, provide technical assistance to MBEs and WBEs to increase their ability to compete effectively for the award of City contracts.

(C) Subject to the prior approval of the Director, contract awarding authorities or departments may invite, encourage or request businesses to joint venture on any contract to promote MBE or WBE participation.

(D) For the purpose of determining Minority and Women Business Enterprise participation:

Contracts awarded to joint ventures in which one or more MBEs or WBEs are combined with one or more businesses which are not Minority or Women Business Enterprises shall be deemed to be awarded to Minority or Women Business Enterprises only to the extent of the Minority or Women Business Enterprises participation in the joint venture.

(E) All contracts subject to this Ordinance shall include the following requirements, in addition to such other requirements as may be set forth elsewhere:

1. bidders and contractors on all contracts shall be required to sign before a notary an affidavit prepared

by the City Attorney, declaring their intention fully to comply with the provisions of the Ordinance;

2. contracts shall incorporate this Ordinance by reference and shall provide that the wilful failure of any bidder or contractor to comply with any of its requirements shall be deemed a material breach of contract;

3. contracts shall provide that in the event that the Director finds that any bidder or contractor wilfully fails to comply with any of the provisions of this Ordinance, rules and regulations implementing the Ordinance or contract provisions pertaining to MBE or WBE participation the bidder or contractor shall be liable for liquidated damages for each contract in an amount equal to the bidder's or contractor's net profit on the contract, or ten percent (10%) of the total amount of the contract or one thousand dollars ($1,000) whichever is greatest, said amount to be determined by the Director pursuant to Section 12D.14.(C). All contracts shall also contain a provision in which the bidder or contractor acknowledges and agrees that the liquidated damages assessed shall be payable to the City upon demand and may be set off against any monies due to the bidder or contractor from any contract with the City.

(F) All contracts or other agreements between the City and County of San Francisco and entities, public or private, where such entities receive money from or through the City for the purpose of contracting with businesses to perform public improvements, shall require such agencies to comply with the provisions of this Ordinance in awarding and administering such contracts,

except where prohibited by State or Federal law or regulation.

Sec. 12D.9. *Additional Findings Supporting Race and Gender-Conscious Bid Preferences – Public Works/Construction.*

(A) In addition to the General Findings set forth in Section 12D.2., and based upon the record before this Board, the Board hereby makes these additional findings in support of the race and gender-conscious bid preference provisions for public works/construction contracts:

1. In Ordinance No. 139-84 this Board identified discriminatory procurement practices against MBEs and WBEs in the award of prime public works/construction contracts.

2. The evidence before this Board relating to the award of prime public works/construction contracts for fiscal year 1987-1988 reflects that MBEs (each ethnic group identified as a minority) and WBEs continue to be awarded contract dollars in amounts that are disproportionately lower than the available number of MBE and WBE prime public works/construction contractors willing and able to perform City construction work. These results cannot be attributed to chance. In light of the testimony before this Board and the Commission in 1983, 1984, 1988 and 1989, this Board finds that these results can only be attributed to discriminatory procurement practices.

3. The evidence before this Board supports the conclusion that MBEs and WBEs continue to be disadvantaged by discriminatory practices when competing for City prime construction contracts.

4. Race-neutral measures employed by the City in the past for those construction contracts subject to the "lowest, reliable, responsible bidder" standard did not prevent the discriminatory practices from occurring.

5. The Board is granting a competitive advantage, the bid preference, to MBEs and WBEs to offset the identified competitive disadvantage caused by the City's discriminatory procurement practices.

(B) For all public works/construction contracts, the contract awarding authority shall furnish the Director with an informational copy of all bid conditions and requests for proposals, along with a statement identifying all funds provided by any other governmental agency which will be used in payment of the contract.

(C) Architect and engineer services provided to the City in connection with a public works/construction contract are governed by Section 12D.11.

Sec. 12D.10. *Additional Findings Supporting Race and Gender-Conscious Bid Preferences – Purchasing Contracts.*

(A) In addition to the General Findings set forth in Section 12D.2. and based upon the record before this Board, the Board hereby makes these additional findings in support of the race and gender-conscious bid preferences for purchasing contracts:

1. In Ordinance No. 139-84 this Board identified discriminatory procurement practices in the award of purchasing contracts.

2. The evidence before this Board relating to the award of contracts for fiscal year 1987-1988 reflects that MBEs (each ethnic group listed as a minority) and WBEs

continue to be awarded contract dollars in certain categories of purchasing contracts in dollar amounts that are disproportionately lower than the available number of MBEs and WBEs in the private sector. These results cannot be attributed to chance. In light of the testimony before this Board and the Commission in 1983, 1984, 1988 and 1989, this Board finds that these results can only be attributed to discriminatory procurement practices.

3. The evidence before this Board supports the conclusion that MBEs and WBEs continue to be disadvantaged by discriminatory practices when competing for the aforementioned purchasing contracts.

4. Race-neutral measures employed by the City in the past for those purchasing contracts subject to the "lowest, reliable, responsible bidder" standard did not prevent the discriminatory practices from occurring.

5. The Board is granting a competitive advantage, the bid preference, to MBEs and WBEs to offset the identified competitive disadvantage caused by the City's discriminatory procurement practices.

(B) Equipment and supplies contracts or general services contracts as defined herein awarded by the Purchaser shall be subject to the race and gender-conscious bid preferences of this Ordinance.

(C) In addition to the duties given the Purchaser elsewhere, the Purchaser shall maintain, with the assistance of the Director, a current list of Minority and Woman Business Enterprises certified by the Commission to provide each of those commodities or services subject to this Ordinance which the Purchaser indicates are

required by the City. The Purchaser shall notify the Director prior to solicitation of bids or quotations whenever no such certified businesses are available for a contract subject to the race and gender-conscious bid preferences of this Ordinance, unless the Director waives such notification based on the known unavailability of such qualified businesses to perform a particular contract. The Director shall attempt to identify qualified businesses, and if successful, shall notify the Purchaser of their availability; the Purchaser shall provide such MBEs and WBEs every practical opportunity to submit bids or quotations.

(D) The Purchaser shall also maintain a central office where all bids, requests for proposals and solicitations will be listed and kept current.

Sec. 12D.11. *Additional Findings Supporting the Race and Gender-Conscious Bid Preferences – Consultants and Professional Services.*

(A) In addition to the General Findings set forth in Section 12D.2. and based upon the record before this Board, the Board hereby makes additional findings in support of the race and gender-conscious bid preferences for the following specifically enumerated professional services contracts: legal, architect and engineer, computer systems, management consulting, medical services.

1. In Ordinance No. 139-84 this Board identified discriminatory procurement practices against MBEs and WBEs in the award of prime professional services contracts.

2. The evidence before this Board relating to the award of prime legal services contracts for fiscal year

1987-1988 reflects that Black law firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Black law firms willing and able to perform legal services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

The statistical evidence before this Board reflects that there are few Asian, Black and Latino owned law firms certified by the Commission to provide legal services to the City. An April 1988 San Francisco Bar Association study concludes that there is significant disparity between equally qualified white and minority lawyers in terms of income, current employment positions, hiring, promotion and retention in San Francisco. The study also concludes that a high percentage of white and minority lawyers believe that racial discrimination plays a role in the employment practices of San Francisco legal employers. In view of this study, the Board finds that minority lawyers are excluded from employment opportunities due to discriminatory employment practices in San Francisco. These employment practices prevent minority lawyers from gaining the necessary experience that would enable minority lawyers to compete for City legal services contracts. The City in its award of legal services contracts will become a passive participant in those practices.

The City is granting Asian, Black, and Latino owned law firms a bid preference to encourage majority law firms to joint venture with these minority owned law firms when competing for the award of City contracts for legal services.

3. The evidence before this Board relating to the award of prime architect and engineering contracts for fiscal year 1987-1988 reflects that Black and woman owned architectural/engineering firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Black and woman owned architectural/engineering firms willing and able to perform these services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

4. The evidence before this Board relating to the award of prime computer systems services contracts for fiscal year 1987-1988 reflects that Asian, Black and women owned computer systems firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian, Black and woman owned computer systems firms willing and able to perform these services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

5. The evidence before this Board relating to the award of prime management consulting services contracts for fiscal year 1987-1988 reflects that Asian, Black and women-owned management consulting firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian, Black and women owned management consulting firms willing and able to perform these services for the City. These results cannot be attributed to chance. This

Board finds that these results can only be attributed to discriminatory procurement practices.

6. The evidence before this Board relating to the award of prime medical services contracts for fiscal year 1987-1988 reflects that Asian, Latino and woman owned medical services firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian, Latino and women owned medical services firms willing and able to perform these services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

7. The evidence before this Board supports the conclusion that aforementioned MBEs and WBEs are disadvantaged by discriminatory practices when competing for City prime professional services contracts.

8. The Board is granting a competitive advantage, the bid preference, to the MBEs and WBEs identified as having been subject to the identified competitive disadvantage caused by the City's discriminatory procurement practices in the award of the aforementioned professional services contracts.

(B) For all professional services contracts as defined herein, the contract awarding authority or the department making the contract award recommendation shall furnish the Director with an informational copy of all bid conditions and requests for proposals, if any, along with a statement identifying all funds provided by any other governmental agency which will be used in payment of the contract. Prior to solicitation of bids or proposals, the Director may make recommendations to the contract

awarding authority with respect to provisions pertaining to MBE and WBE participation.

(C) Professional Services contracts, the estimated cost of which exceeds ten thousand dollars ($10,000), shall be awarded and administered in accordance with the following standards and procedures:

1. The contract awarding authority or the department making the contract award recommendation shall use good faith efforts to solicit bids or proposals from MBEs and WBEs certified to provide the specified services. MBEs and WBEs shall be provided every practical opportunity to submit bids or proposals;

2. City departments shall include amongst consultant selection panelists individuals who are women and minorities.

3. All consultant selection panels and awarding officers shall apply the bid/rating preferences to each stage of the selection process, e.g. qualifications, proposals and interviews. Each evaluator shall score each consultant on a point system based on a predetermined evaluation criteria and predetermined point value. The bid/rating preference shall be applied to the score attained by the MBE, WBE, and/or LBE as set forth in this Ordinance. If the highest score is attained by a MBE or WBE, the department shall enter into good faith negotiations with that consultant. Subject to the prior approval of the Director and upon a showing that those negotiations were undertaken in good faith with the aforementioned MBE or WBE consultant, a department may award the contract to another competing consultant.

Sec. 12D.12. *Good Faith Efforts Required for Other Contracts.*

(A) All City and County departments, commissions, boards, officers and employees, in the deposit of City funds and performance of their other official duties, and in the award of leases, franchises, concessions, and contracts not subject to the race and gender-conscious bid preferences of this Ordinance shall make every good faith effort to use the services of Minority Business Enterprises and Women Business Enterprises. Such services shall include, but are not limited to, the financial services of banks, savings and loan companies and other commercial financial institutions, arrangement of travel and accommodations when traveling on official City business and such other services needed by City departments. Commissions and boards shall submit to the Director on an annual basis a written report on the efforts made pursuant to this subsection.

(B) The City Treasurer, the Controller, the Health Service System and the Retirement Board shall report annually to the Director, with copies to the Mayor or the Chief Administrative Officer, their utilization of MBEs and WBEs.

Sec. 12D.13. *Exceptions and Waivers.*

(A) The Director shall waive the race and gender-conscious bid preferences and good faith efforts requirements of this Ordinance under the following circumstances:

1. whenever the Director finds, with the advice of the contract awarding authority, that needed goods or

services are available only from a sole source which is not a MBE or WBE, and the prospective contractor is not currently disqualified from doing business with the City, or from doing business with any governmental agency based on a failure to comply with Minority or Women Business Enterprise or contract compliance requirements;

2. if the contract awarding authority certifies in writing to the Director that: (1) pursuant to Administrative Code Section 6.30 the contract is necessary to respond to an emergency which endangers the public health or safety and (2) there is no time to apply the bid preference(s) and no MBEs or WBEs capable of performing the emergency work are immediately available; provided that such certification shall be made prior to the Controller's contract certification.

(B) The Director shall waive the five percent (5%) LBE bid preference for contracts in excess of five million dollars ($5,000,000) whenever a contract awarding authority establishes that: (1) sufficient qualified Local Business Enterprises capable of providing the needed goods and services required by the contract are unavailable and (2) sufficient qualified businesses located outside of San Francisco capable of providing the needed goods and services required by the contract are available; or (3) the application of the five percent (5%) LBE preference will result in significant additional costs to the City if the waiver of the bid preference is not granted.

Sec. 12D.14. *Monitoring and Compliance.*

(A) The Director shall monitor the City's progress toward achievement of the goals stated in Section 12D.3. (Declaration of Policy). The Director shall issue an exit

report for any contract which includes MBE/WBE prime contractor participation as a joint venture partner. The purpose of the exit report is to ensure that MBE/WBEs are actually performing services on joint ventures.

(B) *Non Compliance By Contractors*

In cases where the Director has cause to believe that a contractor acting in good faith has failed to comply with any of the requirements of this Ordinance, rules and regulations adopted pursuant to this Ordinance, or contract provisions pertaining to MBE or WBE participation, the Director shall notify the contract awarding authority and shall attempt to resolve the noncompliance through conciliation. If the noncompliance cannot be resolved, the Director shall submit to the Commission and the contractor a written Finding of Noncompliance. The Human Rights Commission shall give the contractor an opportunity to appeal the Finding, and if the Commission concurs with the finding of the Director, it shall take such action as will effectuate the purposes of this Ordinance.

(C) *Wilful or Bad Faith Non Compliance by Contractors*

In cases where the Director has cause to believe that any bidder or contractor has wilfully failed to comply with any of the provisions of this Ordinance, rules and regulations adopted pursuant to this Ordinance, or contract provisions pertaining to MBE or WBE participation, the Director shall be empowered to conduct an investigation and after affording the contractor notice and an opportunity to be heard, may impose sanctions for each violation of this subsection. Such sanctions shall include but are not limited to:

(a) declare the bidder or contractor non responsive and ineligible to receive the award of the contract;

(b) declare the bidder or contractor an irresponsible bidder and disqualify the bidder or contractor from eligibility for providing goods or services to the City and County for a period of five years, with a right of review and reconsideration by the Commission after two years upon a showing of corrective action indicating violations are not likely to reoccur;

(c) if the bidder or contractor is a MBE, WBE and/or LBE, revoke that business' certification as a MBE, WBE and/or LBE;

(d) determine that the bidder or contractor has wilfully failed to comply with the provisions of this Ordinance and pursuant to the provision in the contract contemplated by Section 12D.8. (E) 3. of the Ordinance, calculate the liquidated damages for which the bidder or contractor shall be liable.

Thereafter the Director shall send a written notice to the Controller, the Mayor and to all contract awarding authorities or City department officials overseeing any contract with the bidder or contractor that a determination of a bad faith compliance has been made and that all payments due the bidder or contractor shall be withheld as agreed to by the bidder or contractor and the City pursuant to Section 12D.8. (E) 3.

In addition, the Director shall transmit to the Bureau of Delinquent Revenues a report of the determination of liability and ask the Bureau of Delinquent Revenues to

coordinate efforts with the Controller and other applicable City departments to ensure that the liquidated damages are paid to the City.

The bidder or contractor may appeal the Director's decision to the Human Rights Commission, which may sustain, reverse or modify the Director's findings and sanctions imposed or take such other actions as will effectuate the purposes of this Ordinance.

An appeal by a contractor under this subsection shall not stay the Director's findings.

(D) The Director may require such reports, information and documentation from contractors, bidders, contract awarding authorities and the head of any department, division, or office of the City as are reasonably necessary to determine compliance with the requirements of this Ordinance.

(E) *Non Compliance by City Departments*

Whenever the Director finds after investigation that a contract awarding authority has wilfully failed to comply with the provisions of this Ordinance, a written Finding of Noncompliance specifying the nature of the noncompliance shall be transmitted to the contract awarding authority, the Commission the Mayor and Board of Supervisors; and

The Director shall attempt to resolve any noncompliance through conference and conciliation. Should such attempt fail to resolve the noncompliance, the Director shall transmit a copy of the Finding of Noncompliance along with a finding that conciliation was attempted and failed to the Commission which shall notify the contract

awarding agency to take appropriate action to secure compliance.

The Finding of Noncompliance shall be communicated to the Mayor or the Chief Administrative Officer and the Board of Supervisors.

(F) If the Director has reason to believe that any person has knowingly made, filed, or caused to be filed with the City any materially false or misleading statement or report made in connection with this Ordinance, the Director shall report that information to the City Attorney or the District Attorney for appropriate action. The Director shall be empowered to conduct an investigation and for each violation of this subsection, 12D.14. (F), to impose sanctions as set forth in Section 12D.14. (C).

Sec 12D.15. *Reporting and Review.*

(A) *Reporting by Departments*

By December 31 of each fiscal year all contract awarding authorities and departments shall report annually to the Mayor on their progress in the preceding fiscal year toward achievement of the MBE and WBE participation goals.

(B) *Reporting by the Director*

1. The Director shall report quarterly to the Commission whether the goals stated in Section 12D.3. have been met in whole or in part.

2. The Director shall report to the Commission all waivers granted pursuant to Section 12D.13. Such report shall be made at the first Commission meeting following the granting of the waiver.

(C) *Reporting by the Commission*

By March 1 of each fiscal year subject to this Ordinance, the Commission shall submit an annual report to the Mayor, Board of Supervisors and Chief Administrative Officer on the progress of the City toward the goals stated in Section 12D.3. of this Ordinance, together with an identification of problems and specific recommendations for: (1) discontinuing the race or gender-conscious bid preferences in those cases where the bid preferences have remedied the identified discrimination against MBEs and WBEs; and (2) improving the City's performance in remedying the identified discrimination against MBEs and WBEs.

(D) The Board of Supervisors shall act upon the Commission's recommendations by the third Board meeting of May in each fiscal year subject to this Ordinance.

(E) *Review by the Commission*

This Ordinance shall expire June 30, 1992 unless the Commission, after conducting public hearings, finds that the purposes identified in Section 12D.3. have not yet been achieved, in which case it shall certify said finding to the Board of Supervisors no later than 120 days prior to the expiration date. Thereafter the Board of Supervisors may extend the Ordinance for additional three year periods.

Sec. 12D.16. *Implementing Regulations.*

Not later than thirty (30) days after the enactment of this Ordinance, the Commission shall adopt amendments to the rules, regulations and procedures it adopted and publicly promulgated pursuant to Ordinance 139-84. The

Commission shall afford the public and City departments the opportunity to provide input to and comment on the amendments to the regulations prior to their formal adoption.

Sec. 12D.17. *Severability.*

The provisions of this Ordinance are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this Ordinance, or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of this Ordinance, or the validity of its application to other persons or circumstances.

Sec. 12D.18. *Effective Date.*

This Ordinance shall take effect on July 1, 1989.

APPROVED AS TO FORM:

LOUISE H. RENNE
CITY ATTORNEY

By: /s/ Mara E. Rosales
Deputy City Attorney

Appendix X-1
Table 1
CONSTRUCTION AND FACILITIES MAINTENANCE: PRIME CONTRACTS
CITY OF SAN FRANCISCO

UTILIZATION INDEXES

	Asian	Black	Filipino	Hispanic	Nat. Amer. Alaskan	Minority Total	Non-Minority Total	LBE's # Firms	Female
Percent of contract dollars	4.3%	2.2%	1.1%	3.4%	0.0%	11.1%	88.9%	100.0%	1.2%
Percent availability	23.6%	13.3%	1.7%	11.0%	0.0%	49.5%	50.5%	100.0%	7.0%
Contract dollar utilization index	18.1%	16.9%	65.8%	31.2%	---	22.3%	176.1%	100.0%	17.4%
Statistical significance	-6.372	-4.557	-0.622	-3.378	---	-10.766	10.766	---	-3.168
Number of contracts								196	

Note on statistical significance: -2.0 or less (more negative) shows statistically significant disparity

Number greater than -2.0 (less negative) is not generally considered statistically significant

Appendix X-2
Table 1.A
CONSTRUCTION AND FACILITIES MAINTENANCE: PRIME CONTRACTS
CITY OF SAN FRANCISCO (Census Data)

UTILIZATION INDEXES

	Asian	Black	Filipino	Hispanic	Nat. Amer. Alaskan	Minority Total	Non-Minority Total	Total	Female
Percent of contract dollars	5.4%	2.2%	*	3.4%	*	11.1%	88.9%	100.0%	1.2%
Percent availability	27.7%	8.5%	*	10.7%	*	46.9%	53.1%	100.0%	29.3%
Contract dollar utilization index	19.4%	26.3%	*	32.1%	*	23.6%	167.5%	100.0%	4.1%
Statistical significance	-6.984	-3.152	*	-3.283	*	-10.059	10.059	---	-8.644
Number of contracts								196	

Note on statistical significance: -2.0 or less (more negative) shows statistically significant disparity

Number greater than -2.0 (less negative) is not generally considered statistically significant

Appendix X-3
Table 2
EQUIPMENT AND SUPPLIES
SAN FRANCISCO

UTILIZATION INDEXES

	Asian	Black	Filipino	Hispanic	Nat. Amer. Alaskan	Minority Total	Non-Minority Total	Total	Female
Percent of contract dollars	4.4%	1.2%	0.0%	11.1%	0.0%	16.8%	83.2%	100.0%	10.6%
Percent availability	16.0%	11.8%	2.7%	5.3%	0.0%	35.8%	64.2%	100.0%	15.5%
Contract dollar utilization index	27.4%	10.6%	0.2%	207.9%	---	46.8%	129.7%	100.0%	68.5%
Statistical significance	-21.047	-21.657	-10.969	17.009	---	-26.371	26.371	---	-8.945
Number of contracts						4397			

Note on statistical significance: -2.0 or less (more negative) shows statistically significant disparity

Number greater than -2.0 (less negative) is not generally considered statistically significant

Appendix X-4
Table 3
GENERAL SERVICES
SAN FRANCISCO

UTILIZATION INDEXES

	Asian	Black	Filipino	Hispanic	Nat. Amer. Alaskan	Minority Total	Non-Minority Total	Total	Female
Percent of contract dollars	1.7%	1.0%	0.1%	0.3%	0.0%	3.0%	97.0%	100.0%	0.7%
Percent availability	23.1%	14.0%	3.8%	8.1%	0.0%	48.9%	51.1%	100.0%	26.3%
Contract dollar utilization index	7.2%	6.8%	3.7%	3.4%	---	6.2%	189.8%	100.0%	2.7%
Statistical significance	-20.591	-15.200	-7.708	-11.584	---	-37.154	37.154	---	-23.557
Number of contracts								1638	

Note on statistical significance: -2.0 or less (more negative) shows statistically significant disparity

Number greater than -2.0 (less negative) is not generally considered statistically significant

Appendix X-5
Table 4
PROFESSIONAL SERVICES: TOTAL
SAN FRANCISCO

UTILIZATION INDEXES

	Asian	Black	Filipino	Hispanic	Nat. Amer. Alaskan	Minority Total	Non-Minority Total	Total	Female
Percent of contract dollars	10.7%	5.5%	0.1%	0.7%	0.0%	17.0%	83.0%	100.0%	2.6%
Percent availability	18.0%	18.0%	0.9%	5.3%	0.0%	42.1%	57.9%	100.0%	32.5%
Contract dollar utilization index	59.5%	30.7%	6.7%	14.0%	---	40.4%	143.3%	100.0%	8.0%
Statistical significance	-6.133	-10.486	-2.837	-6.551	---	-16.425	16.425	---	-20.599
Number of contracts								1044	

Note on statistical significance: -2.0 or less (more negative) shows statistically significant disparity

Number greater than -2.0 (less negative) is not generally considered statistically significant

Appendix X-6
Table 5
PROFESSIONAL SERVICES: LEGAL
SAN FRANCISCO

UTILIZATION INDEXES

	Asian	Black	Filipino	Hispanic	Nat. Amer. Alaskan	Minority Total	Non-Minority Total	Total	Female
Percent of contract dollars	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	0.0%
Percent availability	0.0%	50.0%	0.0%	0.0%	0.0%	50.0%	50.0%	100.0%	0.0%
Contract dollar utilization index	---	0.0%	---	---	---	0.0%	200.0%	100.0%	---
Statistical significance	---	-8.806	---	---	---	-8.806	8.806	---	---
Number of contracts								78	

Note on statistical significance: -2.0 or less (more negative) shows statistically significant disparity

Number greater than -2.0 (less negative) is not generally considered statistically significant

Appendix X-7
Table 6
PROFESSIONAL SERVICES: ARCHITECTURE AND ENGINEERING
SAN FRANCISCO: PRIME CONTRACTS

UTILIZATION INDEXES

	Asian	Black	Filipino	Hispanic	Nat. Amer. Alaskan	Minority Total	Non-Minority Total	Total	Female
Percent of contract dollars	21.2%	0.1%	0.0%	5.8%	0.0%	27.1%	72.9%	100.0%	0.6%
Percent availability	25.1%	10.2%	0.6%	2.4%	0.0%	38.3%	61.7%	100.0%	16.8%
Contract dollar utilization index	84.3%	0.8%	0.0%	241.3%	---	70.6%	118.3%	100.0%	3.7%
Statistical significance	-0.698	-2.566	-0.596	1.700	---	-1.779	1.779	---	-3.318
Number of contracts								59	

Note on statistical significance: -2.0 or less (more negative) shows statistically significant disparity

Number greater than -2.0 (less negative) is not generally considered statistically significant

Appendix X-8
Table 7
PROFESSIONAL SERVICES: COMPUTER SYSTEM
SAN FRANCISCO

UTILIZATION INDEXES

	Asian	Black	Filipino	Hispanic	Nat. Amer. Alaskan	Minority Total	Non-Minority Total	Total	Female
Percent of contract dollars	4.0%	5.2%	0.0%	0.0%	0.0%	9.3%	90.7%	100.0%	0.0%
Percent availability	20.0%	20.0%	0.0%	0.0%	0.0%	40.0%	60.0%	100.0%	20.0%
Contract dollar utilization index	20.2%	26.2%	---	---	---	23.2%	151.2%	100.0%	0.0%
Statistical significance	-3.327	-3.080	---	---	---	-5.231	5.231	---	-4.171
Number of contracts								70	

Note on statistical significance: -2.0 or less (more negative) shows statistically significant disparity

Number greater than -2.0 (less negative) is not generally considered statistically significant

Appendix X-9
Table 10
PROFESSIONAL SERVICES: MANAGEMENT CONSULTING
SAN FRANCISCO

UTILIZATION INDEXES

	Asian	Black	Filipino	Hispanic	Nat. Amer. Alaskan	Minority Total	Non-Minority Total	Total	Female
Percent of contract dollars	0.0%	1.1%	0.0%	0.5%	0.0%	1.6%	98.4%	100.0%	1.1%
Percent availability	7.3%	34.5%	0.0%	1.8%	0.0%	43.6%	56.4%	100.0%	61.8%
Contract dollar utilization index	0.0%	3.1%	---	27.1%	---	3.6%	174.6%	100.0%	1.8%
Statistical significance	-4.416	-11.100	---	-1.564	---	-13.377	13.377	---	-19.694
Number of contracts								249	

Note on statistical significance: -2.0 or less (more negative) shows statistically significant disparity

Number greater than -2.0 (less negative) is not generally considered statistically significant

Appendix X-10
Table 11
PROFESSIONAL SERVICES: MEDICAL SERVICES
UTILIZATION INDEXES

	Asian	Black	Filipino	Hispanic	Nat. Amer. Alaskan	Minority Total	Non-Minority Total	Total	Female
Percent of contract dollars	2.1%	79.3%	1.1%	0.0%	0.0%	82.5%	17.5%	100.0%	4.8%
Percent availability	5.9%	29.4%	5.9%	5.9%	0.0%	47.1%	52.9%	100.0%	41.2%
Contract dollar utilization index	35.4%	269.6%	19.3%	0.0%	---	175.3%	33.0%	100.0%	11.6%
Statistical significance	-3.613	24.476	-4.510	-5.589	---	15.880	-15.880	---	-16.528
Number of contracts								500	

Note on statistical significance: -2.0 or less (more negative) shows statistically significant disparity

Number greater than -2.0 (less negative) is not generally considered statistically significant

Board of Supervisors, San Francisco

Passed for Second Reading	§	Finally Passed
May 15, 1989	§	May 22, 1989
Ayes: Supervisors Alioto Britt Gonzalez Hallinan Hongisto Hsieh Kennedy Maher Nelder Walker	§	Ayes: Supervisors Alioto Britt Gonzalez Hallinan Hsieh Kennedy Nelder Walker Ward
Absent: Supervisor Ward	§	Absent: Supervisors Hongisto Maher

I hereby certify that the foregoing ordinance was finally passed by the Board of Supervisors of the City and County of San Francisco

/s/ [illegible]
ACTING CLERK

File No.
284-88-2 May 30, 1989 /s/ ART AGNOS
Date Approved Mayor

No. 91-1345

Supreme Court, U.S.
FILED
MAR 19 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,

Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

THE COALITION FOR ECONOMIC EQUITY; SAN FRANCISCO HISPANIC CHAMBER OF COMMERCE; ASIAN INC.; and SAN FRANCISCO BLACK CHAMBER OF COMMERCE,

Respondents-Intervenors.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err in affirming the District Court's decision that petitioner failed to establish a basis to preliminarily enjoin the implementation of San Francisco's Minority/Women/Local Business Utilization Ordinance as it relates to the award of public construction contracts?

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CASES

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Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630 (1967) 6

Branti v. Finkel, 445 U.S. 507 (1980) 6

City of Grass Valley v. Walkinshaw, 34 Cal.2d 595 (1949) 12

City of Richmond v. Croson, 488 U.S. 469 (1989) .. *passim*

Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir. 1990), *cert denied*, ___ U.S. ___, [111 S.Ct. 516] (1990) 25, 29

Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), *cert denied*, ___ U.S. ___, [112 S.Ct. 875] (1992) 7, 25

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 9, 10

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STATEMENT OF CASE

1. Relevant Background of Legislative Process.

About the time of this Court's decision in *City of Richmond v. Croson*, 488 U.S. 469 (1989), the legislative body of the City and County of San Francisco ("the City"), its Board of Supervisors ("the Board"), was in the process of evaluating whether to extend its Minority/Women/Local Business Utilization Ordinance – I ("1984 ordinance").[1] A part of this process involved an analysis of whether, in light of *Croson*, there was a factual basis for extending the 1984 ordinance. Appendix A to the Petition for Writ of Certiorari ("Pet.") at A7.

To answer this question, the Board embarked on an extensive fact-finding process. Appendix C to Pet. at C2, Section 12D.2. The Board received two statistical studies, one from its Budget Analyst and the other from a private consultant, BPA Economics, Inc. The Board also reviewed the 1983 and 1989 reports prepared by the Human Rights

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[1] On March 23, 1987, the Ninth Circuit decided *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), *petition dismissed*, 493 U.S. 928 (1989) ("*AGCC I*"). That decision considered provisions of the City's 1984 ordinance. The relevant portions of this decision are discussed *infra*.

Unrelated to *AGCC I* but while that litigation was pending for decision in the Ninth Circuit, in 1986, the San Francisco electorate adopted an amendment to Charter Section 7.200. That amendment, discussed *infra*, allows the Board of Supervisors to adjust by ordinance the competitive bidding threshold for the award of construction contracts. Appendix A at A22.

Commission ("HRC"). *Id.* at C2-C3. In addition, the Board conducted ten public hearings, took testimony and written submittals. *Id.* at C2. San Francisco was selected as the "relevant market" for purpose of the statistical studies. *Id.* at C9.

Relying on this evidence and compiling a voluminous legislative record, on May 22, 1989 the Board unanimously adopted Ordinance No. 175-89 ("1989 Ordinance"). Appendix A at A7; Appendix B to Pet. at B5-B6, and fn. 3. The law became effective July 1, 1989. Appendix C at C41, Section 12D.18.

2. District Court's Decision.

Soon after the 1989 Ordinance became law, petitioner Associated General Contractors of California, Inc. ("AGCC") filed an action against the City for declaratory and injunctive relief. AGCC also moved the District Court for a preliminary injunction. The *only* evidence of "irreparable injury" AGCC offered the District Court was the declaration of a contractor who claimed to have made a business decision not to bid on City construction contracts. Appendix B at B9.

After considering the evidence submitted by the parties, the District Court denied AGCC's motion for preliminary injunctive relief. Specifically, the lower court found that AGCC did not establish "a sufficient threat of irreparable injury to warrant a mandatory injunction at this juncture." Appendix B at B32. In addition, the District Court concluded that AGCC had "not persuaded this Court that it is likely to succeed on its claim that the 1989

Ordinance fails to serve the compelling interest of remedying the effects of past discrimination by the City of San Francisco against San Francisco based MBEs [minority business enterprises], or its claim that challenged portions of the Ordinance are not narrowly tailored to that goal." *Id.* at B32.

The Ninth Circuit affirmed the denial of AGCC's motion for preliminary injunction on December 6, 1991. *See* Appendix A at A2. AGCC did not petition for a rehearing.

SUMMARY OF ARGUMENT

There are no sound reasons to grant the petition for a writ of certiorari in this case, especially since petitioner is merely appealing a denial of a preliminary injunction. Indeed, AGCC's petition raises a number of factual issues that would be best resolved by the District Court. Because of the interlocutory nature of this appeal, AGCC will have ample opportunity to raise these questions and present evidence before the District Court. Allowing this case to go to final judgment may lead to a result that will make it unnecessary to decide the issues raised in this petition.

There is no evidence that AGCC members have suffered irreparable injury due to the application of the City's MBE preference program. AGCC also has failed to demonstrate a likelihood of success on the merits on either the state law or constitutional claims. California state law clearly allows the people of San Francisco to

authorize its legislative body to determine the appropriate monetary threshold at which construction contracts should be competitively bid.

Further, the 1989 Ordinance is constitutional. San Francisco's MBE ordinance shares no similarities with the MBE plan in *Croson*. The City relied on extensive and compelling evidence that MBEs faced discrimination within the City's procurement system. San Francisco concluded from the evidence that MBEs suffered competitive disadvantages caused by the City's discriminatory practices. In response, the City adopted a modest remedial program, carefully tailored to address the identified competitive disadvantages.

Accordingly, the Ninth Circuit correctly affirmed the District Court's denial of AGCC's motion for preliminary injunctive relief.

REASONS THE PETITION SHOULD BE DENIED

I. AGCC PRESENTS NO COMPELLING REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

AGCC argues that this Court should grant certiorari for two reasons: (1) the Ninth Circuit decision has departed from the accepted and usual course of judicial proceedings; and (2) the decision conflicts with this Court's decision in *Croson*. AGCC Brief ("AGCC Pet.") at 5-6. Neither reason merits the granting of the petition.

A. This Court Should Not Grant Certiorari Because There Remain Factual Disputes That Need to be Resolved by the District Court.

The exercise of this Court's certiorari jurisdiction is to occur only in very limited circumstances. "[E]xcept in extraordinary cases, the writ is not issued until the final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The petition before this Court, requesting review of a preliminary injunction denial, should be denied because the petition raises a number of issues that can be properly addressed in the District Court.

At the outset, AGCC asserts that "[t]here is nothing further which could be adduced at trial as to whether the necessary facts of prior discrimination had been found by the City and whether the remedy the City elected was narrowly tailored to those facts." AGCC Pet. at 6. However, AGCC's own arguments undercut this assertion by focusing on factual disputes in the record. AGCC Pet. at 14-15. For example, AGCC challenges the selection of San Francisco as the "relevant market" for purposes of the statistical study by BPA Economics, Inc. *Ibid; see Croson*, 488 U.S. at 502, 505; Appendix A at A33; *see also* Appendix B at B17, fn. 15. But AGCC does not identify a more relevant market for City construction contracts, Appendix B at B17, fn. 15, and cannot do so at this preliminary stage of the proceedings. Only through additional discovery could AGCC ascertain whether the proper "relevant market" for a statistical disparity study is a geographical area larger than San Francisco.[2]

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[2] While AGCC contends that "the City frequently contracts with firms from outside its limits" (AGCC Pet. at 14-15),

(Continued on following page)

AGCC also complains that the Court of Appeals "dismissed AGCC's challenge to the manipulation of statistics by City to achieve a lower MBE participation rate." AGCC Pet. at 15. Again, the dispute is factual. Moreover, as the Ninth Circuit noted, AGCC's claim of error was rebutted by evidence submitted by the City. Appendix A at A35. Accordingly, "the District Court's finding that the BPA statistics were reliable was not clearly erroneous." *Ibid.*

This Court has consistently refused to grant certiorari to review factual findings affirmed by a court of appeals. *See Graver Tank Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) [court will not review concurrent findings of fact by lower two courts "in the absence of a very obvious and exceptional show of error"]; *see also Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967); *Branti v. Finkel*, 445 U.S. 507, 512 fn. 6 (1980); *United States v. Doe*, 465 U.S. 605, 614 (1984). In any event, if AGCC desires to provide additional evidence disputing the City's statistics, the appropriate forum for establishing this point is the District Court.

B. AGCC Can Obtain Adequate Relief From the Lower Courts.

AGCC argues that unless this Court grants certiorari, AGCC will be unable to obtain effective relief from race-based preferences. AGCC focuses upon the fact that the 1989 Ordinance is effective for only three years, though it

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this contention, even if true, does not establish that the relevant market is larger than San Francisco.

can be extended for three-year periods. AGCC Pet. at 7; *see* Appendix C at C40, Sec. 12D.15.[3]

AGCC's argument ignores an obvious course of action: summary adjudication of the case. *See Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *cert. denied*, ___ U.S. ___ [112 S. Ct. 875] (1992) [appeal of summary judgment for county in equal protection clause challenge to M/WBE bid preference program].[4] Indeed, as illustrated by *AGCC I*, nothing precludes AGCC members from pursuing summary judgment in a case in the District Court. Moreover, the court of appeals' discussion of the mootness doctrine in *Coral Construction Co.* contradicts AGCC's prediction that the Ninth Circuit has foreclosed the consideration of the merits of the City's MBE program in an appropriate case brought before it. *Id.* at 927-928.[5]

For these reasons, a denial of AGCC's petition is consistent with the long-held principle that this Court

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[3] Consistent with prior decisions of this Court, the City has limited the extent and duration of its remedial program. *Fullilove v. Klutznick*, 448 U.S. 448, 489 (1980) (Burger, C.J. opn.); *see also Croson*, 488 U.S. at 507-508 (discussing narrowly tailored prong of strict scrutiny test).

[4] AGCC does not mention *Coral Construction* in its petition, even though the case was deemed relevant to the instant case by the Ninth Circuit (Appendix A at A31-37). *Coral Construction* at 913.

[5] *See also City of Richmond v. Croson*, 488 U.S. at 478, fn. 1, where this Court noted: "The expiration of the ordinance has not rendered the controversy moot. There remains a live controversy between the parties over whether Richmond's refusal to award appellee a contract pursuant to the ordinance was unlawful and thus entitles appellee to damages."

will generally refrain from addressing a constitutional question where the posture of the case makes it unnecessary to do so. *See Schmidt v. Oakland Unified School District*, 457 U.S. 594 (1982). Allowing this case to go to final judgment at the District Court may well lead to a result that makes it unnecessary to decide the issues raised in this petition. In the event AGCC is unsuccessful, it may appeal that final ruling so that the Ninth Circuit or this Court may consider the merits of the MBE plan. *See Urie v. Thompson*, 337 U.S. 163 (1949) [denial of certiorari at interlocutory stage is without prejudice as to question presented].

C. The District Court and Ninth Circuit Properly Applied the Strict Scrutiny Tests Set Forth in *Croson* and *AGCC I*.

AGCC argues that the lower courts failed to properly apply the strict scrutiny test set forth in *Croson* and *AGCC I*. AGCC Pet. at 7-8. AGCC suggests that the lower courts are required to give greater weight to the plaintiff's evidence merely because the plaintiff alleges a violation of the equal protection clause. *See* AGCC Pet. at 8: "Rather than subjecting City's race-based bid preference to the strict scrutiny required of a suspect classification, the courts below apparently applied a standard of upholding the preferences if any evidence could be found to support them." *Ibid.*

In effect, AGCC argues that the scrutiny which applies in these cases should be "strict in theory but fatal in fact." *See Regents of University of California v. Bakke*, 438 U.S. 265, 361-362 (1978) (opn. of Brennan, White, Marshall

and Blackmun, JJ.). This result-oriented approach has long been discredited. *Ibid.* The District Court's duty in a preliminary injunction case such as this one is to determine whether the plaintiff has produced evidence of irreparable harm and whether the plaintiff is likely to prevail in showing that the challenged ordinance is not narrowly tailored to serve a compelling state interest. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). That is precisely what the District Court did in this case.

Thus, contrary to AGCC's suggestions, the District Court had no duty to embrace AGCC's presentation uncritically, or to view the City's evidence with suspicion. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 292-293 (1986) (O'Connor, J., conc. in part and conc. in judgment). The Court of Appeals evaluated the analysis made by the District Court, and correctly determined that the denial of the preliminary injunction was appropriate.[6]

II. THE DISTRICT COURT AND NINTH CIRCUIT PROPERLY CONCLUDED THAT AGCC FAILED TO DEMONSTRATE THE NEED FOR PRELIMINARY INJUNCTIVE RELIEF.

The traditional standard for granting a preliminary injunction requires that a plaintiff show that in the

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[6] Indeed, review of the District Court's action in this case is limited. (*See* Appendix A at A10.) With respect to findings of fact, the denial of a preliminary injunction can be reversed only if the District Court's findings of fact are clearly erroneous. *Ibid; see also South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Fla.*, 723 F.2d 846, 848 fn. 2 (11th Cir. (1984)), *cert. denied*, 469 U.S. 871 (1984).

absence of an injunction, the plaintiff will suffer irreparable injury and also that it is likely to prevail on the merits. In applying this test, a court must weigh carefully the interests on both sides. *Doran v. Salem Inn, Inc.*, 422 U.S. at 931. In this instance, the lower courts properly determined that AGCC failed to meet those standards.

A. The San Francisco Charter.

AGCC claims the Ninth Circuit erred in concluding that AGCC was unlikely to prevail on the merits of its state law claim. AGCC asserts that the 1989 Ordinance violates state law by effectively amending the San Francisco Charter without a vote of the people. AGCC Pet. at 8-12.

San Francisco's Charter is, in effect, its constitution. *Miller v. City of Sacramento*, 66 Cal.App.3d 863, 867 (1977). Charter Section 7.200 provides in relevant part:

> *When the expenditure for any public work . . . shall exceed the sum of . . . $50,000,* the same shall be done by contract, . . . The head of *the department in charge* of or responsible for the work for which a contract is to be let, . . . *shall let such contract to the lowest reliable and responsible bidder* . . . (emphasis added).

In *AGCC I*, the Ninth Circuit held that the bid preferences in the 1984 ordinance violated the lowest, reliable, responsible bidder provision of Charter Section 7.200 for construction contrasts over $50,000. *AGCC I*, 813 F.2d at 927. At the same time, the court held that the bid preferences for contracts *under* $50,000 did not violate Charter Section 7.200, because the competitive bidding requirement did not apply to such contracts. *Id.* at 927, 944.

Significantly, the City's Charter does not immutably fix the competitive bidding limit at $50,000. Charter Section 7.200 includes the following provisions for flexibility:

> Beginning with fiscal year 1987-88, *the board of supervisors shall be authorized to increase* or decrease *by ordinance the dollar amount set forth in any provision of this section.* (Emphasis added).

Pursuant to this section, on November 22, 1989, the City's Mayor approved Ordinance No. 424-89 ("the bidding threshold ordinance"), which raised the Charter-based competitive bidding threshold from $50,000 to $10 million. Appendix A at A22. Under the bidding threshold ordinance, only public works contracts over $10 million are subject to the Charter requirement that they be let to the lowest, reliable and responsible bidder. Preference for minority, women or local businesses *do not apply* to construction contracts over $10 million. *Ibid.*

The 1989 Ordinance is consistent with the Charter and *AGCC I:* No bid preferences are applied to any construction contract subject to the Charter's competitive bidding requirement. As of 1989, that requirement applies only to contracts over $10 million. The bid preferences at issue do not involve contracts above that limit. Accordingly, AGCC's challenge under the Charter is without merit.

In an effort to avoid this result, AGCC asserts that the people of San Francisco lack the power to allow the Board to adjust the bidding threshold through an ordinance. AGCC argues that Charter Section 7.200 allows the Board to amend the Charter in a manner that is "unauthorized" by the California Constitution; that is,

without a vote of the people. AGCC Pet. at 10-11. AGCC misstates both the record and California law.

In *AGCC I*, the Ninth Circuit recognized the "long-standing rule that there are no limits to a chartered city's regulation of municipal affairs except as expressly limited by the charter provisions." *Id.*, 813 F.2d at 927, citing *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595, 599 (1949); California Constitution Article XI, Sections 3(a), 5(a).[7] The award of construction contracts is a municipal affair and clearly within the people's power to regulate. *R & A Vending Services, Inc. v. City of Los Angeles*, 172 Cal.App.3d 1188, 1192 (1985) [award of contract by charter city "unquestionably a matter of municipal concern"]; *Smith v. City of Riverside*, 34 Cal.App.3d 529, 533-535 (1973) [award of public works contracts a municipal affair].

As the Ninth Circuit acknowledged, under Charter Sections 7.200 and 7.205, the people already have empowered the Board to establish bidding procedures and contracting requirements for the award of contracts.

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[7] California Constitution Article XI, Section 3(a) provides in relevant part: "For its own government, a . . . city may adopt a charter by majority vote of its electors voting on the question. . . . A charter may be amended, revised . . . in the same manner. . . . "

Article XI, Section 5(a) of the California Constitution, governing appropriate provisions in city charters, provides in relevant part: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters. . . . "

AGCC I, 813 F.2d at 927 fn. 9. Determining the appropriate monetary threshold at which construction contracts should be competitively bid is merely an extension of the Board's authority to implement bidding procedures. *See Service Employees Internat'l. Union Local 390/400 v. Board of Supervisors of the City and County of San Francisco*, 180 Cal.App.3d 1179, 1184-1185 (1986).

AGCC's reliance on *Montgomery v. Board of Administration of City Employees' Retirement System of San Diego*, 34 Cal.App.2d 514 (1939) is misplaced. AGCC Pet. at 10-11. That decision supports the City's position. The issue in *Montgomery* was whether the people of San Diego had authorized the city council to adopt ordinances *inconsistent* with the San Diego Charter. In this respect the court noted at pages 520-521:

> If section 146 of the Charter must be construed as giving authority to the city council of San Diego by ordinance to add to or subtract from the charter provisions or make regulations for the administration of the retirement system *inconsistent with the clear provisions of that document, it must be held to be unconstitutional as attempting to permit the amendment of the charter in an unauthorized manner.* (Emphasis added).

Significantly, the *Montgomery* court upheld as constitutional the provision of the San Diego Charter which allowed the city council to enact ordinances implementing the charter. *Id.* at 521. The court construed the charter as permitting the adoption of ordinances *consistent* with the charter provisions. *Ibid.* Here, the bidding threshold ordinance is completely *consistent* with the clear provisions of Charter section 7.200, and AGCC does not argue

otherwise. Both the ordinance and the part of Charter section 7.200 authorizing it are therefore constitutional. *Montgomery,* 34 Cal.App.2d at 520-521; *Service Employees Internat'l. Union Local 390/400 v. Board of Supervisors,* 180 Cal.App.3d at 1184.

Contrary to AGCC's claims, the Ninth Circuit also properly concluded that AGCC failed to show that the balance of hardships tipped in its favor on the state law claim. *See* AGCC Pet. at 11. As the District Court found, "92.7 percent of the City's prime construction contract dollars awarded to San Francisco firms went to non-MBEs, while only 7.3 percent went to certified *and* non-certified MBEs." Appendix B at B9, fn. 9. Accordingly, "it is apparent that AGCC members are competing for and winning the vast majority of construction contracts." *Ibid.* AGCC has not and cannot rebut this finding of fact. *See* Appendix A at A41. In short, there is no support in the record for AGCC's assertion that the 1989 Ordinance or the bidding threshold ordinance deprive AGCC members "of the opportunity to pursue a fundamental right [i.e., a lawful profession]." AGCC Pet. at 11-12.

AGCC apparently alleges that even if the bidding threshold ordinance is valid, the Ninth Circuit had to require the City to provide a race-neutral explanation for its action in order for the ordinance to be deemed valid. AGCC Pet. at 9-12. This argument is based on an assumption that the motivation underlying the bidding threshold ordinance was to discriminate against non-MBEs. AGCC Pet. at 11-12. But the Board's motivation underlying its adoption of the bidding threshold ordinance is irrelevant to the question presented here: Does the bidding threshold ordinance violate the Charter? And even assuming

the Board's motives or reasoning are relevant, there is no evidence that the Board acted for impermissible racially discriminatory reasons. Indeed, to ascertain the Board's motivations, AGCC would need to pursue further discovery on this issue. The forum to test its theory is the District Court.

B. The Equal Protection Clause.

AGCC argues that San Francisco's MBE program suffers from the same constitutional deficiencies present in the MBE plan in *Croson*. AGCC Pet. at 12-25. This claim fails when the evidence underlying the findings made in the Ordinance are contrasted with the evidence supporting the MBE plan at issue in *Croson*.

1. The *Croson* Test

a. Factual Basis for Richmond's Plan

The District Court in *Croson* upheld Richmond's MBE Plan ("the Plan") based on the following facts before the Richmond City Council:

> (1) The ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received .67% of prime contracts from the city while [Blacks] constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation

> in the construction industry nationally. 488 U.S. at 479-481, 499.

This Court rejected the evidentiary basis for the Plan, concluding that: (1) the mere recitation of a benign or legitimate basis for a racial classification is entitled to little or no weight; (2) the testimony submitted to the Richmond City Council, which was conclusory, unrelated to Richmond's construction industry and too generalized, had little probative value; (3) race-conscious action may not rely on contrasts between the minorities' share of the general population and minorities' share of prime contract dollars; (4) the mere paucity of minority business membership in local contractors' associations, without more, is not probative; and (5) Congress' findings of nationwide discrimination in the construction industry cannot be used by Richmond to justify a similar local MBE program. *Id.* at 498-506.

At the same time, this Court was careful not to close the door on race-conscious, remedial affirmative action programs in public contracting. The Court noted at page 504:

> While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.

Significantly, "some showing of prior discrimination by the governmental unit involved," *Wygant v. Jackson Board of Education*, 476 U.S. at 274, is *not* a prerequisite to a valid affirmative action program in public contracting. *Croson*,

488 U.S. at 492-493; *see also id.*, at 528-550 (Marshall, J., dissenting).

The Court indicated the type of strong evidentiary basis that would support a legislative identification of discrimination and consequently justify the adoption by a municipality of a remedial race-conscious program: (1) first-hand testimony of racial discrimination (*see Croson*, 488 U.S. at 500-501); (2) testimony of private sector discriminatory practices in the relevant industry or locality (*ibid*); (3) a significant statistical disparity between the percentage of contracts or contract dollars awarded to qualified minority contractors and the percentage of the qualified contractors that are minority. (*Id.* at 501-502; *Wygant v. Jackson Board of Education* at 274-275 (plurality opinion)); (4) still other facts presented to a municipality may be sufficient to justify affirmative action. *See Croson*, 488 U.S. at 492 [evidence showing that city is a "passive participant" in a system of racial exclusion practiced by the local construction industry]; *id.* at 503-504 [significant statistical disparity between local MBEs eligible for membership and MBE membership in local contractors' association]; *id.* at 509 [city may act to dismantle a closed business system set up by the city or its prime construction contractors].

The evidence before the District Court here demonstrates that the factual predicate supporting San Francisco's MBE ordinance satisfies these standards.

2. The 1989 Ordinance is Constitutional Under *Croson*.

a. The Factual Predicate of the 1989 Ordinance.

As stated, the City undertook an extensive fact-finding process to ascertain whether there was cause to extend the 1984 ordinance. The Board received two statistical studies, one from its Budget Analyst and the other from BPA Economics, Inc. Appendix C at C2-C8, Sec. 12D.2. In addition, the Board conducted ten public hearings, took testimony and written submittals. *Ibid.* In Section 12D.2 of the 1989 Ordinance, the Board relied upon testimonial and statistical evidence gathered by the City in 1983, 1984, 1988 and 1989, and made the following key findings which apply to the award of public construction contracts:

> 4. The testimony of businesses that seek to enter into contracts with the City or are doing business with the City, as presented to this Board and as detailed in the Human Rights Commission's 1988 report, offer clear and persuasive reasons for the Board of Supervisors to take the actions proposed by this Ordinance to remedy: (1) City contracting practices and community conditions that cause the exclusion or reduce the opportunities of minority and woman owned businesses to be awarded City contracts to such an extent that the amount of City contract dollars awarded to them can only be explained by discrimination; and (2) competitive disadvantages local business continue to face in providing goods and services to the City.

* * *

10. Some City departments continue to operate under the "old boy network" when awarding contracts. The City's "old boy network" constitutes a closed business system created and implemented by the City for all contracts, including those subject to the competitive bid process. Discrimination against and insensitivity to MBEs and WBEs continue to persist in the City's procurement process. The closed environment in which City businesses operate has excluded MBEs and WBEs and has placed them under a competitive disadvantage when competing for City prime contracts.

11. The statistical evidence before this Board relating to the award of contracts subject to this Ordinance for fiscal year 1987-1988 reflects that in almost all areas of contracting MBEs (each ethnic group identified as a minority) and WBEs continue to be awarded contract dollars that are disproportionately lower than the available numbers of MBEs and WBEs in San Francisco. These data are gathered and summarized in Appendix X, which contains utilization indices described as Tables 1 through 7, and 10 through 11, and is attached to this Ordinance and incorporated herein by reference as though fully set forth. These utilization indices measure the disparity between MBEs (as a group and each ethnic group identified as a minority) or WBE participation in City prime contracts and their share of their relevant industry or profession. That disparity is measured in terms of a statistical significance. When measure of the statistical significance is minus two (-2) or less, the Board concludes that the disparity cannot be attributed to chance.

> Based upon the weight of the testimony and other evidence before this Board and the Commission in 1983, 1984, 1988 and 1989, the Board finds that the statistical disparities can only be attributed to discriminatory procurement practices of the City against MBEs and WBEs.
>
> Based on the testimony and other evidence before this Board and the Commission in 1983, 1984, 1988 and 1989, the Board finds that the aforementioned statistical disparities are also attributed to discrimination in the private sector against MBEs and WBEs that is manifested in and perpetuated and exacerbated by the City's procurement practices.

Appendix C at C4, C7, C8.

In Section 12D.9 of the 1989 Ordinance, the Board made these additional findings regarding the award of public construction contracts:

1. In Ordinance No. 139-84 this Board identified discriminatory procurement practices against MBEs and WBEs in the award of prime public works/construction contracts.

2. The evidence before this Board relating to the award of prime public works/construction contracts for fiscal year 1987-1988 reflects that MBEs (each ethnic group identified as a minority) and WBEs continue to be awarded contract dollars in amounts that are disproportionately lower than the available number of MBE and WBE prime public works/construction contractors willing and able to perform City construction work. These results cannot be attributed to chance. In light of the testimony before this Board and the Commission in 1983, 1984, 1988 and 1989, this

Board finds that these results can only be attributed to discriminatory procurement practices.

3. The evidence before this Board supports the conclusion that MBEs and WBEs continue to be disadvantaged by discriminatory practices when competing for City prime construction contracts.

4. Race-neutral measures employed by the City in the past for those construction contracts subject to the "lowest, reliable, responsible bidder" standard did not prevent the discriminatory practices from occurring.

5. The Board is granting a competitive advantage, the bid preference, to MBEs and WBEs to offset the identified competitive disadvantage caused by the City's discriminatory procurement practices.

Appendix C at C26, C27.

After reviewing the massive legislative file in support of the 1989 Ordinance, the District Court concluded that San Francisco's ordinance did not suffer from the deficiencies identified in Richmond's Plan. Specifically, the District Court found:

> Here, San Francisco has done far more than declare a benevolent purpose and point to generalized discrimination in the construction industry and statistics with little probative value. Rather, it has "identified discrimination" against MBEs in San Francisco by both the city and private contractors.

Appendix B at B17.

The Ninth Circuit conducted its own review of the District Court's decision and concluded that "the record

documents a vast number of individual accounts of discrimination, which bring 'the cold [statistical] numbers convincingly to [life]'." Appendix A at A34.

Without directly challenging this conclusion, AGCC identifies two alleged errors of law by the Ninth Circuit.[8] First, AGCC asserts that the Ninth Circuit accepted the same kind of "generalized assertions" of past discrimination as those deemed insufficient in *Croson*. AGCC Pet. at 13-14. In fact, the Ninth Circuit found that the City's findings in the 1989 Ordinance were substantially more specific than those found inadequate in *Croson*. Appendix A at A36. The appellate court said of the findings: "[T]hey are clearly based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as significant statistical disparities in the award of contracts." *Ibid.*

In *Croson*, this Court required a municipality to "identify discrimination" before embarking on a race-conscious program. *Id.* 488 U.S. at 505. There is no mandate that the legislative findings specifically detail each and every instance that the legislative body has relied upon in support of its decision that affirmative action is necessary. *Id.* at 500, 505. In her concurring opinion in *Wygant*, Justice O'Connor explains the function and nature of findings adopted by the local government in affirmative action cases:

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[8] AGCC's challenges to issues of fact are addressed in sections I.A. and B., *supra*.

> A violation of federal statutory or constitutional requirements does not arise with the making of a finding; it arises when the wrong is committed. Contemporaneous findings serve solely as a means by which it can be made absolutely certain that the governmental actor truly is attempting to remedy its own unlawful conduct when it adopts an affirmative action plan, rather than attempting to alleviate the wrongs suffered through general societal discrimination. . . . Such findings, when voluntarily made by a public employer, obviously are desirable in that they provide evidentiary safeguards of value to both nonminority employees and to the public employer itself, should its affirmative action program be challenged in court.

Wygant, 476 U.S. at 289-290; *see also id.* at 304-305 (Marshall, J. dissenting); *Cf. Croson*, 488 U.S. at 501 ("[W]here gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern or practice of discrimination.") Consistent with *Croson* and *Wygant*, the 1989 Ordinance sets forth with specificity the identified discrimination that the City is attempting to remedy.

b. The "Narrowly Tailored" Prong.

The second alleged error of law concerns the Ninth Circuit's application of the "narrowly tailored" prong of the strict scrutiny test. AGCC Pet. at 16-26.

In *Croson*, this Court had difficulty assessing whether Richmond's Plan was narrowly tailored because it was "not linked to identified discrimination in any way." *Id.*,

488 U.S. at 507. However, the Court made two observations about the MBE Plan. First, Richmond did not evaluate race-neutral measures before adopting the race-based set-aside. *Ibid.* Second, this Court viewed the 30% set-aside as irrelevant to any goal "except perhaps outright racial balancing," because of the set-aside's gross over-inclusiveness. *Id.* at 479, 507.

In order for a plan to be "narrowly tailored," a municipality need not adopt every possible race-neutral means to cure the problem before instituting a race-conscious program. *Croson*, 488 U.S. at 469. Unlike the City of Richmond, San Francisco considered and adopted several race-neutral measures in conjunction with the MBE program. *See* Appendix A at A38-39. San Francisco took a balanced approach by utilizing those race-neutral means that were reasonable under the circumstances.

While AGCC focuses on the Board's legislative Finding 13, Appendix C at C8, which considered and rejected certain race-neutral or less drastic methods, AGCC overlooks other relevant sections of the 1989 Ordinance which specifically address race-neutral or less drastic means adopted prior to or in conjunction with the 1989 MBE bid preference plan.[9] *See* Board of Supervisors' legislative Finding 12 at Section 12D.2, Appendix C at C8 [City adopts guidelines to standardize bond and insurance requirements for City contracts; *see also* Section 12D.8.(B), Appendix C at C21-C24, *e.g.* Sections 12D.8.(B)1 [City

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[9] AGCC concedes that an MBE plan is narrowly tailored if the plan is instituted "either after, or in conjunction with race-neutral means of increasing minority business participation in public contracting." AGCC Pet. at 16.

must make good faith efforts to solicit and obtain bids from MBEs]; 12D.8.(B)3 [contracting must be arranged by size and type of work to facilitate MBE participation]; 12D.8.(B)4 [City is to adjust bid bonding and insurance requirements as recommended by City Risk Manager]; 12D.8.(B)5 [City to use revolving fund that may be established to help MBEs meet bonding/insurance requirements]; 12D.8.(B)11 [City to provide MBEs with technical assistance].

AGCC suggests that enforcement or enactment of nondiscrimination laws in and of itself would cure the problems identified by the City. AGCC Pet. at 24-25. The evidence is to the contrary. The Board found, *inter alia*, that MBEs operate at a competitive disadvantage when seeking business with the City. Appendix C at C7, Section 12D.2 [Finding 10]. As the record reflects, previous enforcement of the City's nondiscrimination ordinance did not correct the competitive disadvantages suffered by MBEs as a result of discriminatory procurement practices. Appendix A at A39. The bid preference is a narrowly tailored method to equalize the position of MBEs *vis-a-vis* non-minority contractors.

Since *Croson*, appellate court decisions have provided guidance about the "narrowly tailored" prong. The Ninth and Eleventh Circuits have held that one indicator of a "narrowly tailored" MBE plan is program flexibility. *Coral Construction Co. v. King County*, 941 F.2d at 924; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990), *cert. denied*, ___ U.S. ___ [111 S.Ct. 516] (1990). San Francisco's MBE program has the elements of a "narrowly tailored" plan.

First, for construction contracts, the Board granted MBEs "a competitive advantage, the bid preference, . . . to offset the identified competitive disadvantage caused by the City's discriminatory procurement practices." Appendix C at C27 [Finding 5]. The City chose a remedy that most closely addressed the identified problem. Appendix A at A40, fn. 12. The City found that the remedy it selected, a 5% bid preference, was a "competitive plus," Appendix C at C5 [Finding 7], and was a modest attempt by the City to open up a previously closed business system the City had created. *Id.* at C7, Sec. 12D.2. [Finding 10].[10] The City narrowly tailored its remedy by choosing to give appropriate MBEs a competitive bidding advantage rather than setting rigid goals or setting aside specific contracts exclusively for MBEs.

Second, under the ordinance, even non-minority firms can take advantage of the bid preference; they can joint venture with MBEs. Appendix A at A41; Appendix C at C21-C22, Section 12D.8.(B)2. The reasonableness of the City's approach is demonstrated by the relatively small burden non-MBE contractors have suffered under the 1989 Ordinance. *See* Appendix A at A41. The fact that San Francisco MBEs have received just over 7% of City contracting dollars under the ordinance (*see* Appendix B at B26) shows that AGCC's membership is still able to benefit significantly from the City's prime contracting program.

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[10] AGCC mischaracterizes the MBE bid preference at issue. It is a 5%, not 10%, race-conscious bid preference. Appendix A at A8; *see* AGCC Pet. at 22-23.

Third, the bid preference is only permitted where it is tied to the underrepresentation of a particular minority group. This underrepresentation is determined by comparing contracts awarded to minority business enterprises with the number of minority business enterprises available to do the work. Appendix A at A39-A40. In contrast, the City of Richmond relied upon general population statistics. *Croson*, 488 U.S. at 501. In addressing the actual exclusion of minority business enterprises, San Francisco has narrowly tailored its use of the bid preference to those groups which were specifically identified as having been discriminated against. Appendix A at A39-A41.

Finally, the flexibility of the ordinance is also demonstrated by its waiver provisions. AGCC's argument that a waiver is only applicable where no MBEs are available ignores the fact that this is a bid preference ordinance and not a set-aside law guaranteeing that certain contracts go to MBEs. There is only one reason, other than fiscal savings, for the City to waive the bid preference requirements: Where there has been no documented pattern or practice of discrimination against MBEs. In those circumstances, majority businesses may seek waivers of the bid preference granted MBEs. Appendix C at C17-C18, Section 12D.6.(A)4.

Thus, unlike the City of Richmond, San Francisco's bid preference benefit is not solely based on race but is conferred on members of groups which were determined to have suffered discrimination. The City adopted the bid preference plan after thorough analysis of statistics and oral and written testimony. By tailoring its ordinance to the discrimination found to exist against particular

groups, the City has overcome the problem of improperly benefiting those who have not necessarily been affected by discrimination in the public contracting process. *Cf. Croson*, 488 U.S. at 506.

AGCC inaccurately characterizes as quotas the numerical indices used by the City to measure the law's effectiveness. AGCC Pet. at 10-19. The indices are used solely to ascertain when the ordinance should expire. Appendix C at C9. Further, the numbers are adjusted annually to assure the measures remain accurate. *Id.* at C19, C21, Sections 12D.6.(B)2, 12D.8.(A)(1). There is no requirement that contracts be set aside for MBEs at a certain rate or that any percentage of contracts go to MBEs. The indices are necessary to ensure the bid preference does not continue once the competitive disadvantage from which MBEs suffer is eliminated. Appendix C at C19, Section 12D.6(B)2.

AGCC's final attack on the 1989 Ordinance as not being narrowly tailored is a bold attempt to reopen settled law regarding whether a racial preference program must benefit only individuals who are the victims of discrimination. *See Wygant v. Jackson Board of Education*, 476 U.S. at 274-276; *Local Number 93, Internat'l Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Local 28, Sheet Metal Workers' Internat'l Association v. E.E.O.C.*, 478 U.S. 421 (1986). *Croson* did not change this aspect of the law. There, this Court was concerned that the overinclusiveness of Richmond's law allowed minority *groups* which had not suffered discrimination to benefit. *Croson*, 488 U.S. at 506. No such infirmity exists in the San Francisco law. It is carefully tailored to the particular situation

of individual minority groups. Appendix C at C10, Section 12D.4.

Nor is the ordinance unconstitutional simply because the preference is only provided to "economically disadvantaged" MBEs which are determined to be disadvantaged according to the amount of business they do. *See* AGCC Pet. at 21. Every beneficiary of an affirmative action program need not prove that he or she is a victim of discrimination. *See Wygant*, 476 U.S. at 274-275. Similarly, to pass constitutional muster, an ordinance such as San Francisco's need not require that each MBE prove that it was a victim of discrimination and economically disadvantaged by such discrimination before seeking the bid preference. In fact, inclusion of the $14 million cut-off for the definition of disadvantaged MBEs (Appendix C at C12) assures that the ordinance does not provide a windfall to an MBE that no longer suffers the effects of discrimination. *See Cone Corp.*, 908 F.2d at 917. The 1989 Ordinance is narrowly tailored.

CONCLUSION

The 1989 Ordinance is a carefully written instrument, narrowly tailored to achieve its express remedial purpose while containing flexibility to ensure it is not implemented to unfairly burden non-minority businesses.

In the District Court, AGCC failed to sustain its burden of demonstrating either probable success on the merits, irreparable injury or that the balance of hardships tips sharply in its favor. Accordingly, the Ninth Circuit properly affirmed the District Court's denial of AGCC's

motion for a preliminary injunction. For all the foregoing reasons, this Court should deny AGCC's petition for a writ of certiorari.

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